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PREFACE TO THE FIFTH EDITION.



THE Editor having again had the opportunity of revising this work has endeavoured to increase its utility as a book of reference for practitioners without rendering it less acceptable to the law student.

The very wide range of subjects covered by these Leading Cases makes it difficult for many of the principles dealt with in the notes to receive that detailed discussion which they may justly be considered to deserve. This deficiency has, as far as possible, been remedied by a careful selection of the cases cited as illustrating the text.

The industry of the reporters is mainly responsible for the somewhat considerable increase in the bulk of the present Edition.

RICHARD WATSON.

12, PICCADILLY, BRADFORD,
December, 1895.

PREFACE TO THE FOURTH EDITION.



THE death of the learned author of this work occurred shortly after the publication of the last (the third) edition.

A new edition having been called for, the present editor has endeavoured carefully to revise the notes, which in some cases have been re-written, and to incorporate the numerous decisions and statutes which have since been given and passed with respect to the subjects of them.

The cases on Contracts have been re-arranged, and although the form and character of the book do not admit of a perfectly scientific treatment of the law of contracts, it is hoped that the change may prove useful.

A somewhat large addition has been made to the cases cited. The references to all cases have been carefully revised, and the date of each decision, and a second reference, when existing, have been added.

It may be observed that many modern decisions of importance do not find their way into the Law Reports, but are reported only in either the Law Times Reports, Law Journal Reports, or Weekly Reporter; so that the importance of a case cannot be determined by its reference.

The Index of Cases cited, which was omitted in the last edition, has been restored. A list of statutes referred to, and abbreviations used, have also been added.

RICHARD WATSON.

21, OLD SQUARE, LINCOLN'S INN,
August, 1891.

PREFACE TO THE FIRST EDITION.



THE work now submitted to law students differs considerably from other collections of leading cases.

In the first place, *the number* of cases is much larger. "Fifty or sixty leading cases," says the late Mr. Samuel Warren, "thoroughly understood and distinctly recollected, will be found of incalculable value in practice; serving as so many sure landmarks placed upon the trackless wilds of law. *And why should not the number be doubled? or even trebled?* What pains can be too great to secure such a result?"

My object has been to bring together and to elucidate the 150 cases of most general importance in the Common Law. And, however far short of that object I may have fallen, I think it will be admitted that any student whose diligence enables him to master their names and principles will have laid for himself a good foundation of legal learning.

The present work differs also in *style*. I have adopted it as likely to arrest the attention, aid the memory, and make the study of the law less dry and repulsive.

"That I have written in a semi-humorous vein," says an eminent authority, "shall need no apology, if thereby sound teaching wins a hearing from the million. There is no particular virtue in being seriously unreadable."

Moreover, now and then, in the stating of a case certain deviations from strict accuracy may be discovered. Such deviations (except, of course, where I may have been unfortunate enough to fall into errors) have been made on the "reading made easy" principle. For instance, I have treated nearly every case as if at *nisi prius*; deeming it undesirable to confuse the student, and withdraw his attention from the true point and effect of the decision by appeals, rules for new trials, &c.

And the pleasing, if somewhat rare, spectacle is accordingly presented of a successful litigant getting the speedy justice he is entitled to.

It will be observed, too, that though the volume in which a case may be found is always given, the page is not. My explanation of this unusual proceeding is that I regard it of extreme importance that a practitioner should have at command the exact *volume* in which a leading case is to be found. To remember the exact *page* also, would be knowledge too excellent and unattainable; a Macaulay or a Fuller might achieve it, but not an ordinary person. But by constantly seeing the reference, and taking a kind of mental photograph of it, a student of average memory ought in a short time to find that he knows exactly where an important case is reported.

It is almost unnecessary to add that the work is put forward simply as a Student's Manual—*always remembering that a person does not cease to be a student merely because he is called to the Bar, or admitted a Solicitor*. One of my objects (though, of course, not the chief one) has been to act as a guide to that masterly and exhaustive work, Smith's Leading Cases. I have adopted nearly all the cases which appear as leading cases in that collection, and have sometimes even followed the lines of the notes.

I gratefully acknowledge help and valuable suggestions from other members of the profession, and particularly from my learned friends, Mr. C. M. Atkinson, of the Inner Temple and North-Eastern Circuit, and Mr. Wilfred Allen, of the Inner Temple; and trust my Leading Cases will prove useful to those for whom they are intended.

W. S. S.

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- A. & E. Adolphus & Ellis [1834—1840] Queen's Bench.
 A. & E. N. S. Adolphus & Ellis, New Series [1841—1852] Queen's Bench.
 Adm. D. Law Reports [1876—1890] Admiralty Division.
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The Student is recommended to tear this Map out of the Book (if his own) and pin it up in some conspicuous place, where the Cases will constantly catch his eye.

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CONTRACTS.

Formation of Contracts.

OFFER AND ACCEPTANCE.

Proposal may be retracted before Acceptance.

COOKE v. OXLEY. (1790)

[1.]

[3 T. R. 653.]

OXLEY having a quantity of tobacco on hand proposed to Cooke to sell him 266 hogsheads of it. Cooke liked the looks of the offer, but not being quite able to make up his mind on the subject, asked to be allowed till four o'clock to decide; and Oxley consented to this. But after Cooke had gone away to think it over, Oxley altered his mind, and resolved not to let Cooke have his tobacco.

This was an action by Cooke for non-delivery of the tobacco: but he did not succeed, because it was held that, as there was no consideration for Oxley's promise to keep his offer open, he could retract it with impunity at any time before Cooke announced his assent to it (*a*).

(*a*) Although this case has been freely criticised by eminent authors in America, the soundness of the principle it has established cannot now be questioned in this country. The point raised is discussed in Benjamin on Sale, p. 69 (1th ed.). The action was not on the promise to keep the offer open, but for the non-delivery of goods as upon a complete bargain and sale; and

the declaration was held insufficient because it did not allege that the defendant had actually left the offer open for acceptance as he had promised. But see Pollock on Contracts, p. 25 (*g*) (5th ed.); and p. 24 (*a*) (6th ed.). The case, however, must not be read as supporting the view that a tacit revocation is sufficient.

Consideration for proposal.

It is to be observed that if Cooke had given Oxley sixpence for keeping the offer open, or if he had agreed to pay a higher price for the tobacco in consequence, there would have been a consideration for Oxley's promise, and he would have been bound by it. The case was followed in *Routledge v. Grant* (*b*) (where it was held that defendant having offered to buy a house in St. James's Street, and to give plaintiff six weeks for a definite answer, he might at any time during the six weeks, and before it was accepted, withdraw his offer), and it may be taken to be clear law that *a mere proposal may be revoked at any time before acceptance*. If, however, the offer is made under seal it cannot be revoked; even though uncommunicated to the person to whom it is intended to be made, it remains open for acceptance when he becomes aware of it, but if the promisee then refuses his assent the contract is avoided (*c*). It is on this principle that at an auction a bidding can be retracted any time before the hammer goes down (*d*). Till then there has been no acceptance of the bidder's proposal. An auctioneer who advertises the sale of certain goods does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the goods shall be actually sold (*e*). But where a sale is advertised as *without reserve*, and a lot is put up and bid for, there is a binding contract between the auctioneer and the highest bidder that the goods shall be knocked down to him (*f*).

Biddings at auctions.

Auction sales are now governed by sect. 58 of the Sale of Goods Act, 1893 (*g*), which provides as follows:—

- “(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:
- (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:
- (3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer:

(*b*) (1828), 4 Bing. 653. See also *Bristol Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616; 59 L. J. Ch. 472.

(*c*) *Xenos v. Wickham* (1866), L. R. 2 H. L. 296; 36 L. J. C. P. 313.

(*d*) *Payne v. Cave* (1789), 3 T. R.

148; and see *Warlow v. Harrison* (1858), 1 E. & E. 295; 28 L. J. Q. B. 18; 29 L. J. Q. B. 141.

(*e*) *Harris v. Nickerson* (1873), L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

(*f*) *Warlow v. Harrison*, *supra*, (*g*) 56 & 57 Vict. c. 71.

- (4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

A mere declaration of intention, and a mere invitation for offers, must be distinguished from the offer or proposal which is the first step in the formation of a contract. The revocation of a proposal, however, to be effective, *must be communicated to the other party before acceptance*; but it is not necessary that there should be an actual and express withdrawal of the offer, or what is called a retraction; for knowledge in point of fact of the proposer's changed intention, however ascertained by the other party, will make the proposer's conduct a sufficient revocation (*h*). An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered (*i*). Contract by letter.

In such a case *the contract is complete the moment the letter accepting the offer is posted, even though it never reaches its destination* (*k*). The recent case of *Henthorn v. Fraser* (*l*) is a very good illustration of the law applicable to the formation of contracts by letters sent through the post. *Henthorn v. Fraser*. H., who lived at Birkenhead, called at the office of a land society in Liverpool, to negotiate for the purchase of some houses belonging to them, and the secretary signed and handed to him a note giving him the option of purchase for fourteen days at 750*l*. On the next day the secretary posted to H., between twelve and one o'clock, a withdrawal of the offer, which reached Birkenhead at 5 p.m. In the meantime H. had, at 3.50 p.m., posted to the secretary an unconditional acceptance of the offer, which was delivered in Liverpool at 8.30 p.m., after the society's office had closed, and was opened by the secretary on the following morning. It was held that a binding contract was made on the posting of H.'s acceptance, that the revocation of the offer was too late, and that H. was entitled to specific performance; and the rules of law governing the case were stated to be: (1) That where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of

(*h*) *Dickinson v. Dodds* (1876), 2 Ch. D. 463; 45 L. J. Ch. 777.

(*i*) *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344; 49 L. J. C. P. 316; and *Stevenson v. McLean* (1880), 5 Q. B. D. 346; 49 L. J. Q. B. 701.

(*k*) *Dunlop v. Higgins* (1848), 1 H. L. 381; *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. Div. 216; 48 L. J. Ex. 577.

(*l*) [1892] 2 Ch. 27; 61 L. J. Ch. 373.

communicating the acceptance of it, the acceptance is complete as soon as it is posted; (2) That in the present case, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post; (3) That a revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and that therefore a revocation sent by post does not operate from the time of posting it. The rule that the revocation of an offer must be received before the letter of acceptance is posted has been based upon different grounds, viz., (α) that the post office is the common agent of both parties (m), or (β) that by general usage, the relation between the parties, or the terms of the offer, an acceptance through the post has been contemplated. It may also be supported on the ground of convenience. An offer by telegram is presumptive evidence that a prompt reply is expected, and an acceptance by letter may be evidence of such unreasonable delay as to justify a withdrawal of the offer (n). A proposer may not prescribe a time or form of refusal so as to bind the other party if he does not refuse in the specified time or form (o). If no time is limited for acceptance, it must be communicated within a reasonable time (p). The death of the proposer before acceptance effects a revocation of the offer, although unknown to the other party.

Contract
by adver-
tisement.

An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by a definite person; thus, an action can be maintained for a reward offered in an advertisement by any person who, though unaware of the reward (q), has fulfilled the conditions therein prescribed. The leading case on the subject is *Williams v. Carwardine* (r), where the defendant had caused a handbill to be published to the effect that whoever would give such information as should lead to the discovery and conviction of the murderer of one Walter Carwardine should receive a reward of 20*l*. In an action by a woman against the person who had offered the reward, it was held that she was entitled to succeed, although the jury expressly found that she had not been induced to give the information by the offer of the reward, but by other motives. "There was a contract," said Parke, J., "with any

(m) But see per Kay, L.J., in *Henthorn v. Fraser*, *supra*.

(n) *Quenerduaine v. Cole* (1883), 32 W. R. 185.

(o) *Felthouse v. Bindley* (1862), 31 L. J. C. P. 204; 11 C. B. N. S. 869.

(p) *Ramsgate Hotel Co. v. Montifiore* (1866), L. R. 1 Ex. 109; 35 L. J. Ex. 90.

(q) *Gibbons v. Procter* (1891), 64 L. T. 594; 55 J. P. 616. It is difficult, however, to reconcile this decision with the ordinary principles governing the formation of contracts.

(r) (1833), 4 B. & Ad. 621. See also *Denton v. G. N. Ry. Co.*, *post*, p. 251.

person who performed the condition mentioned in the advertisement." In *Carlill v. Carbolic Smoke Ball Co.* (s), the defendants advertised that they would pay 100*l.* reward to any person who contracted influenza after having used their "Carbolic Smoke Ball" according to the printed directions supplied. The plaintiff, on the faith of this advertisement, purchased from a chemist one of the defendants' "Smoke Balls," and used it according to the directions, but nevertheless contracted influenza, and accordingly claimed the 100*l.* The Court held that the advertisement was an offer to contract, which by the performance of the conditions therein contained, the plaintiff had accepted, and that, having regard to the character of the transaction, no notification of acceptance of the offer was necessary, and consequently there was a binding contract by the defendants to pay the 100*l.* The case of *In re Agra and Masterman's Bank* (t), is a good illustration of a definite acceptance of a general offer addressed to an indefinite and unascertained body of persons.

The
"Smoke
Ball"
case.

Importance of Mutuality.

JORDAN v. NORTON. (1838)

[2.]

[4 M. & W. 161.]

Farmer Norton wrote to Farmer Jordan offering to buy a particular mare if the latter would warrant her "*sound and quiet in harness.*" Farmer Jordan wrote back warranting her "*sound and quiet in double harness,*" but saying he had never put her in *single* harness. The mare was taken to Norton's by an agent, who exceeded his authority (and whose act was immediately repudiated), and then turned out to be unsound. This was Farmer Jordan's action for the price of the mare, and the real question was whether or not there was a complete contract. This question was decided in the negative. "The correspondence," said Parke, B., "amounts altogether merely to this: that

(s) [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(t) (1867), L. R. 2 Ch. 391; 36 L. J. Ch. 222.

the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties have never contracted in writing *ad idem*."

"Good"
barley and
"fine"
barley.

It takes two to make a contract, and those two must have agreeing minds. That being so, an offer must be assented to *in the precise terms in which it is made*. *Jordan v. Norton* is an excellent illustration of this. So is *Hutchison v. Bowker* (*u*), where, it having been shown that in the corn trade there was a distinction between "good" barley and "fine" barley, there was held to be no binding contract between a person who offered to sell "good" barley and one who wrote back, "we accept your offer, *expecting you to give us fine barley and full weight*." So, too, if there is an offer of a house, and the answer is, "I decide to take the house, if you and my agent, Mr. So and So, can agree upon the terms; if not, write to me," there is no final agreement (*x*). But it has been held that although in the written acceptance of a tender there may be an intimation that a more formal document will be afterwards prepared, yet the parties may be bound to the terms of the tender and acceptance (*y*).

Incom-
plete con-
tract.

The mere statement of the lowest price at which a vendor will sell contains no implied contract to sell at that price to the person making the inquiry. In the recent case of *Harvey v. Facey* (*z*), the plaintiffs telegraphed, "Will you sell us B. H. P.? Telegraph lowest cash price," and the defendants telegraphed in reply, "Lowest price for B. H. P. 900*l*," and then the plaintiffs telegraphed, "We agree to buy B. H. P. for 900*l*. asked by you. Please send us your title-deed in order that we may get early possession," but received no reply. It was held that there was no contract, as the final telegram was not the acceptance of an offer to sell, for none had

(*u*) (1839), 5 M. & W. 535.

(*x*) *Stanley v. Dowdeswell* (1874), L. R. 10 C. P. 102; 23 W. R. 389; and see *Hussey v. Horne-Payne* (1879), 4 App. Ca. 311; 48 L. J. Ch. 846; and *Preston v. Luck* (1884), 27 Ch. D. 497; 33 W. R. 317.

(*y*) *Lewis v. Brass* (1877), 3 Q. B. D. 667; 37 L. T. 738; distinguishing *Rossiter v. Miller* (1878), 3 App. Ca. 1124; 48 L. J. Ch. 10. See also *Bolton v. Lambert* (1889), 41 Ch. Div. 295; 58 L. J. Ch. 425;

Bristol Acrated Bread Co. v. Maggs (1890), 44 Ch. D. 616; 59 L. J. Ch. 472; discussed in *Bellamy v. Debenham* (1890), 45 Ch. D. 481; 60 L. J. Ch. 166; upheld, though on different grounds, by the Court of Appeal, [1891] 1 Ch. 412; 60 L. J. Ch. 166. A good selection of the numerous cases deciding what amounts to an unqualified acceptance is to be found at p. 40 in *Pollock on Contracts* (5th ed.).

(*z*) [1893] A. C. 552; 62 L. J. P. C. 127.

been made, but was itself an offer to buy, the acceptance of which must be expressed and could not be implied.

The contract may be binding on one party but not on the other ; *e. g.* on the party contracting with an infant, but not on the infant himself (*a*) ; on the party who has signed a contract within the Statute of Frauds, but not on the party who has not signed (*b*). So, a person whose tender to supply stores to a railway company, "in such quantities as the company's storekeeper might order from time to time," is accepted, may be bound to supply though the company are not bound to order (*c*). It should be observed that the acceptance of the tender did not make the contract sued upon ; it was merely an intimation by the company that they regarded Witham's tender as an offer ; the tender was really a standing offer which could be revoked by notice to the company at any time before it was accepted by an order being given.

Contracts may be inferred as well as expressed. An inferred contract is one which the Court, on principles of reason and justice, presumes from the conduct of the parties they intended to make ; for either the offer or acceptance, or both, may be conveyed by conduct as well as by words, that is, may be tacit or express. If, for instance, a man avails himself of the benefit of services done for him, the Court may supply the formal words of contract and require him to pay an adequate compensation. An instance of an implied contract is furnished by the case of *Pollard v. Photographic Co.* (*d*), where it was held that a photographer may not sell or exhibit, or otherwise deal with the photographic negatives of a private person who has employed him to take the photograph (*e*).

Inferred or tacit contracts are sometimes erroneously called implied contracts ; but the former are true contracts, while the latter are *quasi*-contracts merely, or, in other words, in the former the Court may infer, in the latter the law will imply, the promises (*f*).

(*a*) *Holt v. Ward* (1795), 2 Strange, 937.

(*b*) *Laythoarp v. Bryant* (1836), 2 Bing. N. C. 735.

(*c*) *G. N. Ry. Co. v. Witham* (1873), L. R. 9 C. P. 16 ; 43 L. J. C. P. 13.

(*d*) (1889), 40 Ch. D. 345 ; 58 L. J. Ch. 251.

(*e*) See also *Tuck v. Priestler* (1887), 19 Q. B. D. 629 ; 56 L. J.

Q. B. 553 ; and *Merryweather v. Moore*, [1892] 2 Ch. 518 ; 61 L. J. Ch. 505 ; *Lamb v. Evans*, [1893] 1 Ch. 218 ; 62 L. J. Ch. 404 ; *Robb v. Green*, [1895] 2 Q. B. 315 ; 11 T. L. R. 330.

(*f*) Per cur. *Morgan v. Ravey* (1861), 30 L. J. Ex. 131 ; 6 H. & N. 265 ; Just. Inst. lib. 3, tit. 27. "Quasi ex contractu, teneri videntur."

Contract sometimes binding on one party only.

Inferred contracts.

CAPACITY OF PARTIES.

Infants.

[3.]

PETERS v. FLEMING. (1840)

[6 M. & W. 42.]

Mr. Fleming was an undergraduate at Cambridge, son of a gentleman of fortune and a Member of Parliament, and while under age he became indebted to a tradesman of the town for rings, pins, a watch, and various other articles, which were supplied to him on credit. When he came of age, the tradesman successfully brought an action against him, and recovered the price of the goods. "The true rule," said Parke, B., "I take to be this, that all such articles as are *purely ornamental* are not necessary, and are to be rejected, because they cannot be requisite for anyone; and for such matters, therefore, an infant cannot be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party in order *to support himself properly in the degree, state and station of life in which he moved*; if they were, for such articles the infant may be responsible."

RYDER *v.* WOMBWELL. (1868)

[4.]

[L. R. 4 Ex. 32; 38 L. J. Ex. 8.]

Mr. Wombwell was the younger son of a deceased Yorkshire baronet. During his minority he had 500*l.* a year, and when he came of age would be entitled to a lump sum of 20,000*l.* While yet a minor, he ordered of Ryder and Co., the jewellers, a silver gilt goblet of the value of 15*l.* 15*s.*, and a pair of studs of the value of 25*l.* The studs were for his own wearing, but the goblet, was intended, as the plaintiff was aware, as a present to a friend. To an action for the price of these articles, Wombwell set up the defence of “infancy,” to which the reply was “necessaries.”

At first the judges thought the studs were “necessaries,” though not the goblet; but it was finally resolved that *neither the studs nor the goblet were necessaries.*

A person under the age of twenty-one is an “infant,” and by the common law his contracts are voidable at his option, either before or after he attains his majority, unless for *necessaries*. A recent statute (the Infants’ Relief Act, 1874) has made certain contracts by infants not only voidable, but absolutely void. It is not always easy to determine what are “necessaries,” for the term is, in law, a relative one, and differs according to the circumstances and condition of life of the infant at the time of the sale and delivery. Nothing can be a necessary which cannot possibly be useful; though the converse is not true, for a useful thing may be of unreasonably extravagant design or material.

Section 2 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), Sale of Goods Act, 1893. provides that “Where necessaries are *sold and delivered* to an infant he must pay a reasonable price therefor. ‘Necessaries’ in this section, mean goods suitable to the condition in life of such infant, and to his actual requirements at the time of the *sale and delivery.*” The following rules may, therefore, now be taken to be established, namely, (a) That an infant is not liable for non-acceptance of necessaries; (b) That the “actual requirements” of the infant are

to be determined, not at the date of the order, but at the time of delivery or supply (*g*).

Necessaries.

Food, clothes, medicine, and the like—such things as are essential to life—are what the lay mind would understand by “necessaries.” But in process of time the word has acquired a technical meaning which cannot be ascertained in a particular instance without reference to the cases. Amongst things held to be “necessary” may be mentioned a servant’s livery (*h*), a volunteer uniform (*i*), horse exercise (*k*), decent burial (*l*), instruction in a trade, education (*m*); while, on the other hand, a valuable chronometer (*n*), cigars and tobacco (*o*), and dinners out of college (*p*), have been held not to be. A great deal depends on the social position of the infant; and, as civilization advances and luxuries increase, things become admitted into the class of “necessaries” which, when simpler tastes prevailed, might have been dispensed with. The question, whether “necessaries” or not, is one *for the jury*, subject to the control of the Court. Evidence being given of the things supplied, and the circumstances of the infant, the Court determines whether the things supplied can reasonably be considered necessities at all; and if it comes to the conclusion that they cannot, it may not even submit the case to the jury, but at once direct judgment to be entered for the defendant.

A purchase by an infant of necessities on credit will be valid, even though it be proved that he had an income at the time sufficient to furnish him with ready money to supply himself with necessities suitable to his condition (*g*). An infant cannot bind himself by the acceptance of a bill of exchange, even though given

(*g*) This rule is submitted as the correct interpretation of the section. The words, however, taken in their most grammatical sense, refer only to cases where sale and delivery take place *uno ictu*. It might also be said that they refer to two separate times; so that if the infant was sufficiently supplied at either the time of sale or the time of delivery, the goods would not be necessities. Another suggested meaning is to read the word “and” as “or,” in which case the seller would be entitled to recover the price of necessities, if at either of the above times the infant had “actual requirements.” This section is fully and ably dealt with in the treatise by Ker and Pearson-Gee on The Sale of Goods Act, pp. 9—18.

(*h*) *Hands v. Slaney* (1799), 8 T. R. 578.

(*i*) *Coates v. Wilson* (1804), 5 Esp. 152.

(*k*) *Hart v. Prater* (1837), 1 Jur. 623.

(*l*) *Chapple v. Cooper* (1844), 13 M. & W. 252; 13 L. J. Ex. 286.

(*m*) *Walter v. Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738.

(*n*) *Berolles v. Ramsay* (1815), Holt, N. P. 77.

(*o*) *Bryant v. Richardson* (1866), L. R. 3 Ex. 93 (3).

(*p*) *Brooker v. Scott* (1843), 11 M. & W. 67; *Wharton v. McKenzie* (1844), 5 Q. B. 606; 13 L. J. Q. B. 130.

(*q*) *Burghart v. Hall* (1839), 4 M. & W. 727.

for the price of necessities supplied to him (*r*). But he is liable on a bond, without penalty, given for necessities, the form, however, of the contract being disregarded, and the obligation being treated as one on simple contract (*s*).

An infant is liable for "necessaries" supplied to his wife and children just as much as if they were supplied to himself (*t*).

Even, however, when the goods are "necessaries," the infant can get away from his contract by showing that he was already plentifully supplied with such things; and ignorance of a tradesman, who supplies goods of a useful class, that the infant is already sufficiently supplied, cannot assist him, for he acts at his peril. In the recent case of *Johnstone v. Marks* (*u*), Lord Esher, M.R., remarked, "It lies upon the plaintiff to prove not that the goods supplied belong to the class of necessities as distinguished from that of luxuries, but that the goods supplied when supplied (*x*) were necessities to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it." The knowledge or belief of the tradesman has nothing to do with the question whether the goods are necessary or not. The actual, and not the apparent, position and means of the infant at the date of the contract are alone material. It is an answer to the plea of infancy that the defendant cheated the tradesman into the belief that he was of age (*y*).

Already well supplied.

Fraud.

An infant cannot succeed in an action for specific performance, because, the infant not being himself bound, the remedy is not mutual (*z*).

Specific performance.

An infant need not repay money lent to him, even though lent for the purpose of his buying necessities with it; for, as Parker, C.J., suggested in a case (*a*) of the kind, "it may be borrowed for necessities, but spent at a tavern, and therefore the law will not trust him but at the peril of the lender who must lay it out for

Rashness of lending money to infants.

(*r*) *In re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339.

(*s*) *Walter v. Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; quoting *Russell v. Lee* (1662), Lev. 86; Coke, Litt. 172; Vin. Ab. Infant, c. (7).

(*t*) *Turner v. Frisby* (1794), 1 Str. 168, and *Rainsford v. Fenwick* (1671), Carter, 215; and see *Ford v. Fothergill* (1795), Peake, 301.

(*u*) (1887), 19 Q. B. D. 509; 57 L. J. Q. B. 6, following *Barnes v. Toye* (1884), 13 Q. B. D. 410; 53 L. J. Q. B. 567; *Bainbridge v.*

Pickering (1780), 2 Wm. Bl. 1325; *Brayshaw v. Eaton* (1839), 5 Bing. N. C. 231; *Foster v. Redgrave* (1866), L. R. 4 Ex. 35, n. 8; *Ryder v. Wombwell*, must be considered overruled on this point, decided by the court of first instance, L. R. 3 Ex. 90; 38 L. J. Ex. 8.

(*x*) See *ante*, 56 & 57 Viet. e. 71, s. 2.

(*y*) Rose, N. P. p. 598 (15th ed.).

(*z*) *Flight v. Bolland* (1828), 4 Russ. 298.

(*a*) *Earle v. Peale* (1712), 1 Salk. 386.

him." And see sect. 5 of 55 Vict. c. 4, *post*, p. 16. An infant who acquires railway shares is in the same situation as an infant acquiring real estate, and in an action for payment of calls the defence of infancy will not be sufficient unless it shows a repudiation of the shares (*b*).

If an infant pays money under a contract which has been wholly or partly performed by the other party, he cannot by rescinding the contract recover the money back, though he might have done so if the goods had not been delivered or the contract otherwise wholly or partly performed, for the maxim *quod fieri non debuit, factum valet* will apply (*c*). By way of corollary to an infant's liability for necessaries, it has been said that he may be absolutely bound by a contract which is clearly for his benefit; thus in *Wood v. Fenwick* (*d*), Lord Abinger, C.B., said, "There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him." So, too, in the recent case of *Clements v. London and North Western Ry. Co.* (*e*), an infant railway servant, who, as a condition of his service, entered an insurance society, established and contributed to by the railway company, and agreed to accept the benefits of the society in lieu of any claims under the Employers' Liability Act, was held bound by the agreement, as being for his benefit. On the other hand, however, in *Flower v. London and North Western Ry. Co.* (*f*), an agreement by an infant with a railway company, in consideration of being allowed to travel on special terms, to waive all claims by himself, his executors, administrators, or relatives, for accident, injury or loss to himself or his property on the railway, even if occasioned by negligence of the company's servants, and to indemnify the company against any such claim, was held to be detrimental to the infant, and therefore not binding on him. An agreement by a next friend not to appeal, on the understanding that the successful defendant would not ask for costs, was, in the recent case of *Rhodes v. Swithenbank* (*g*), held to be not binding on the infant, as being of no benefit to her, as she was not under any circumstances liable for costs. Covenants in an apprenticeship deed that the infant shall not enter into any professional engagement without the master's consent are not binding, and will not be enforced by injunction (*h*). An agreement,

(*b*) *Mitchell's case* (1870), L. R. 9 Eq. 363.

(*c*) *Holmes v. Blogg* (1818), 8 Taunt. 508; *Ex parte Taylor* (1856), 8 D. M. & G. 254; *Valentini v. Canali* (1889), 24 Q. B. D. 166; 59 L. J. Q. B. 74.

(*d*) (1842), 10 M. & W. 195; and see *Leslie v. Fitzpatrick* (1877), 3

Q. B. D. 229; 47 L. J. M. C. 22.

(*e*) [1894] 2 Q. B. 482; 63 L. J. Q. B. 837.

(*f*) [1894] 2 Q. B. 65; 63 L. J. Q. B. 547.

(*g*) (1889), 22 Q. B. D. 577; 58 L. J. Q. B. 287.

(*h*) *Gylbert v. Fletcher* (1607), Cro. Car. 179; *Meakin v. Morris*

however, by an infant, in consideration of being employed as a milk carrier, not to compete in business within a radius of five miles for two years after leaving, has been held to be valid (*i*).

The rule that an infant's contract is binding on him if for his benefit, is not confined to contracts of apprenticeship or service (*k*). Particular covenants in an infant's settlement may be valid (*l*), but they must be beneficial (*m*).

Although an infant (except in the cases stated above) cannot contract so as to bind *himself*, yet he binds *the other party*; infancy being "a personal privilege of which no one can take advantage but the infant himself." Thus, if a boy of seventeen were to propose to a widow of forty, and agree to marry her, his promise to her would not be actionable, but hers to him would be (*n*).

Other party may be bound.

The Infants' Relief Act, 1874 (*o*), provides as follows:—

Sect. 1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of the common law or equity, enter, except such as now by law are voidable.

Sect. 2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*p*).

By the Common Law, all infants' contracts (except for necessaries) were voidable (*q*); now, by sect. 1 of this Act, three kinds of contracts are absolutely void. Although sect. 2 avoids any ratifica-

(1884), 12 Q. B. D. 352; 53 L. J. M. C. 72; approved in *Corn v. Matthews*, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; and *De Francesco v. Barnum* (1890), 43 Ch. D. 165; 59 L. J. Ch. 151; and see 45 Ch. D. 430; 60 L. J. Ch. 63.

(*i*) *Evans v. Ware*, [1892] 3 Ch. 502; 62 L. J. Ch. 256. And see *Cornwall v. Hawkins* (1872), 41 L. J. Ch. 435; *Fellows v. Wood* (1889), 59 L. T. 513; 52 J. P. 822; and *Brown v. Harper* (1893), 68 L. T. 488; 3 R. 585.

(*k*) *Per Kay, L. J.*, in *Clements v. L. & N. W. Ry. Co*, *supra*.

(*l*) *Smith v. Lucas* (1881), 18 Ch. D. 531; 45 L. T. 460.

(*m*) *Cooper v. Cooper* (1887), 13 App. Cas. 88; 59 L. T. 1.

(*n*) *Holt v. Ward* (1733), 2 Str. 937.

(*o*) 37 & 38 Vict. c. 62.

(*p*) *Smith v. King*, [1892] 2 Q. B. 543; 67 L. T. 420. See also *In re Foulkes*, *Foulkes v. Hughes* (1893), 69 L. T. 183; 3 R. 682, a case where, after majority, a reconveyance and fresh mortgage were executed.

(*q*) *Williams v. Moor* (1843), 12 L. J. Ex. 253; 11 M. & W. 256.

tion after full age of *any* contract made during infancy, the result is not to place voidable contracts in the same position as contracts absolutely void. If a contract void under sect. 1 has been partly performed by the infant, he cannot set aside what has been done. Sect. 2 supersedes sect. 5 of Lord Tenterden's Act (9 Geo. 4, c. 14), by which no ratification could be sued on unless in writing.

Courtship
and mar-
riage.

One or two breach of promise cases have called for the construction of this second section: and from them it would appear that, before the young lady can get damages from the defendant, she must show distinctly that he committed himself to a *fresh promise* after he came of age: *e.g.* (as in *Ditcham v. Worrall* (*r*)), by asking her to *name the day*, or (as in *Northcote v. Doughty* (*s*)) by saying, "*Now I may and will marry you as soon as I can.*" The mere continuance of amatory conduct will not do, because no new promise can be implied from such attentions, and the Act of Parliament prevents their being looked at as a ratification (*t*).

Marriage
settle-
ment.

A settlement of property made by an infant on her marriage is (except where authorized by the Infants' Settlement Act, 1855 (*u*)), as regards the infant, voidable and not void, and is not within either section of the Infants' Relief Act, 1874 (*x*); and, accordingly, the infant is bound to repudiate the settlement, if at all, within a reasonable time after her coming of age (*y*).

Contract
for pay-
ment of
loan
advanced
during in-
fancy void.

The Betting and Loans (Infants) Act, 1892 (*z*), renders penal the inciting of infants to betting or wagering or to borrowing money, and sect. 5 provides as follows:—"If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

"For the purposes of this section any interest, commission or other

(*r*) (1880), 5 C. P. D. 410; 49 L. J. C. P. 688.

(*s*) (1879), 4 C. P. D. 385.

(*t*) *Coxhead v. Mullis* (1878), 3 C. P. D. 439; 47 L. J. C. P. 761.

(*u*) 18 & 19 Vict. c. 43.

(*x*) *Duncan v. Dixon* (1890), 44 Ch. D. 211; 59 L. J. Ch. 437.

(*y*) *Edwards v. Carter*, [1893] A. C. 360; 63 L. J. Ch. 100; and *sub nom.* *Carter v. Silber*, [1892] 2

Ch. 278; 61 L. J. Ch. 401. This case also decided that, in order to establish the invalidity of an infant's repudiation of a contract after he comes of age, it is not necessary to show his knowledge of the facts and of his rights; but that he must be treated as knowing the contents of the deed whether he knew them or not.

(*z*) 55 Vict. c. 4.

payment in respect of such loan shall be deemed to be a part of such loan.”

An infant who enjoys a beneficial interest in property is liable to such obligations as are incident to such interest; *e.g.*, if he is a shareholder he is liable to pay calls on his shares when he comes of age, unless he has previously repudiated the contract; if he is a partner (although he cannot be made liable for partnership debts) he is bound by the partnership accounts as between himself and his partners; and so if, being a lessee, he continues to hold land after coming of age, he is liable for arrears of rent accrued during his infancy (*a*).

An infant is liable for a tort, but a breach of contract cannot be treated as a tort so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract; it must be something quite outside the terms of the contract. Thus, in the case of *Jennings v. Rundall* (*b*), where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable for damages upon the contract by bringing the action in tort for negligence. But where an infant hired a horse for riding, and the plaintiff expressly refused to let it for jumping, and the infant lent it to a friend to use for jumping, and it was thereby killed, it was held that the infant was liable; for, as Willes, J., said, "it was a bare trespass not within the object and purpose of the hiring; it was doing an act altogether forbidden by the owner" (*c*). An infant innkeeper or carrier cannot be made liable in contract for the loss of goods entrusted to him in his business (*d*). On this principle it was held that an infant could not be made liable for a false representation, at the time of making the contract, that he was of full age; but he might be liable to restore any advantage thereby obtained, and be bound by payments made or acts done on the faith of such representations. He may, however, be liable in equity on the ground that "an infant may not take advantage of his own fraud," and since the Judicature Acts the rule of equity prevails. Compare *Clarke v. Cobley* (*e*) and *Lemprière v. Lange* (*f*). An infant cannot be made bankrupt by a creditor under a voidable contract (*g*). Interrogatories cannot be administered to an infant

(a) *Kettle v. Elliott* (1614), Rolle, Abr. 1, 731 K.

(b) (1799), 8 T. R. 335; *Manby v. Scott* (1672), 1 Sid. 129; *Stikeman v. Dawson* (1847), 16 L. J. Ch. 205.

(c) *Burnard v. Haggis* (1863), 32 L. J. C. P. 189; 14 C. B. N. S. 45:

Price v. Hewett (1852), 8 Ex. 116 ;
Johnson v. Pie (1665), Sid. 258.

(d) Rolle, Abr. p. 2, D. par. 3.

(c) (1789), 2 Cox, 173.

(*f*) (1879), 12 Ch. D. 675; 41 L.
378.

(g) *Ex parte* Jones (1881), 18 Ch. D. 109; 50 L. J. Ch. 673.

plaintiff or defendant (*h*); and he cannot be compelled to make discovery of documents (*i*).

An infant is a "person" within the meaning of section 6 of the Companies Act, 1862 (*k*), and so entitled to sign a memorandum of association for the purpose of the incorporation of the company (*l*).

Contracts of Lunatics.



[5.] BAXTER v. PORTSMOUTH. (1826)

[5 B. & C. 170; 7 D. & R. 614.]

On various occasions between 1818 and 1823 the Earl of Portsmouth hired carriages and horses from the plaintiff, and thereby incurred the bill for which this action was brought. It was proved that the plaintiff had no reason to suppose his lordship to be of unsound mind; and that the carriages, &c. were constantly used by him, and were suitable to his rank and station. This being so, the plaintiff's claim was not defeated by its having been found in 1823 by a commission that the Earl "then was, and from the 1st of January, 1809, continually had been, of unsound mind, not sufficient for the government of himself."

Two propositions seem clear:—

Executory contracts. (1.) A lunatic is never liable on an *executory* contract, even for necessities. But the better opinion is that such a contract is not void but voidable, so that, if the man gets better, he may confirm it (*m*).

Executed contracts. (2.) A lunatic is sometimes liable on *executed* contracts. He is liable on executed contracts for *necessaries* for his wife as well as for

(*h*) *Mayor v. Collins* (1890), 24 Q. B. D. 361; 59 L. J. Q. B. 199.

(*i*) *Curtis v. Mundy*, [1892] 2 Q. B. 178; 40 W. R. 317. But whether an infant litigant in a *divorce suit* is exempt from discovery, *quære*. See *Redfern v. Redfern*, [1891] P. 139; 60 L. J. P. 9.

(*k*) 25 & 26 Vict. c. 89.

(*l*) *In re Laxon & Co.*, [1892] 3 Ch. 555; 61 L. J. Ch. 667.

(*m*) *Matthews v. Baxter* (1873), L. R. 8 Ex. 132; 42 L. J. Ex. 73; and see *In re Weaver* (1882), 21 Ch. Div. 615; 48 L. T. 93.

himself (*n*), if no advantage has been taken of him, even though the person supplying them was aware of his condition. But he is also liable on all fair and *bonâ fide* executed contracts in the ordinary course of life (*e.g.*, for the sale of an annuity) when the other contracting party believed himself to be dealing with a sane man and the transaction has gone so far that the *status quo ante* cannot be restored (*o*).

In the case of *Beavan v. M'Donnell* (*p*), the plaintiff entered into a contract for the purchase of land, and paid a deposit of 415*l.*, which, by the terms of the contract, was to be forfeited if the plaintiff should refuse to complete. At the time of the contract the plaintiff was a lunatic, but of this the defendant, who acted *bonâ fide*, was not aware. The plaintiff, refusing to complete, sued for the return of the deposit, but it was held that he was not entitled to recover. And in *Dane v. Kirkwall* (*q*) it was held that to constitute a defence to an action for use and occupation of a house taken by the defendant, it is not enough to show that the defendant was a lunatic and the house unnecessary, but also that the plaintiff knew this and took advantage of the fact.

Purchase of land.

Occupation of house.

The law was recently concisely stated by Lopes, L. J., in the case of *Imperial Loan Co. v. Stone* (*r*), to be as follows: "A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at that time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

If a trustee has properly expended sums of money for the protection and safety, or for the maintenance and support of his *cestui que trust*, at a time when the latter was of unsound mind, he will be allowed credit for such sums of money (*s*).

Trustee's rights.

A contract made by a person of sound mind who afterwards

(*n*) *Read v. Legard* (1851), 6 Exch. Rep. 636; 20 L. J. Ex. 309. But see per Brett, L. J., in *re Weaver*, *supra*, at p. 620.

(*o*) *Molton v. Camroux* (1848), 4 Ex. 17; 2 Ex. 487; 18 L. J. Ex. 68, 356.

(*p*) (1854), 9 Ex. 309. See also *Brown v. Jodrell* (1827), M. & M. 105; *Elliott v. Ince* (1857), 7 De G. M. & G. 475; 26 L. J. Ch. 821.

(*q*) (1838), 8 C. & P. 679; *Niell v. Morley* (1804), 9 Ves. 478.

(*r*) [1892] 1 Q. B. 599; 61 L. J. Q. B. 449.

(*s*) *Sherwood v. Sanderson* (1815), 19 Ves. 280; *Williams v. Wentworth* (1842), 5 Beav. 325; *Nelson v. Duncombe* (1846), 9 Beav. 211; *Stedman v. Hart* (1854), Kay, 607; 23 L. J. Ch. 908.

becomes a lunatic is not invalidated by the lunacy, and in *Owen v. Davies* (*t*) specific performance of such a contract was decreed. As to the mode in which such contracts may be carried out, reference should be made to the provisions of the Lunacy Act, 1890 (*u*).

Lucid interval. Contracts entered into by a lunatic during a lucid interval are valid (*x*).

Agency. The insanity of the principal, as between himself and his agent, *ipso facto* revokes the agency; but the lunatic is liable on contracts entered into by the agent with persons ignorant of the fact of the principal's lunacy, and to whom the lunatic had, when sane, represented the agent's authority (*y*).

The insanity of an agent also *ipso facto* revokes the agency.

Marriage. A lunatic is incapable of contracting marriage (*z*).

Necessaries. Since the fusion of law and equity, it is not very material to decide whether, if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. Brett, L. J., in the case of *In re Weaver* (*a*), thought not; but in the recent case of *In re Rhodes* (*b*) (where the numerous authorities are referred to), the Court of Appeal, affirming Kay, J., dissented from this view, and held that the Court will imply such an obligation where necessaries have been supplied under circumstances which justify the Court in implying an obligation to repay the money spent upon them. And now, by sect. 2 of the Sale of Goods Act, 1893 (*c*), where necessaries are sold and delivered to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefor; and "necessaries" in this section mean goods suitable to the condition in life of the purchaser, and to his actual requirements at the time of the sale and delivery.

Delusions. Mere delusions with regard to the subject-matter of it will not in themselves be sufficient reason for setting a contract aside. Thus, it has been held that a lease of a farm may be valid though the lessor laboured under the fancy that it was impregnated with sulphur (*d*). "Although a man," said Jessel, M. R., "may believe

(*t*) (1747), 1 Ves. sen. 80.

(*u*) 53 Vict. c. 5. See especially sects. 120 and 135; also, *In re Pagani*, [1892] 1 Ch. 236; 66 L. T. 244.

(*x*) *Hall v. Warren* (1804), 9 Ves. 605; *Selby v. Jackson* (1843), 6 Beav. 192; 13 L. J. Bk. 249.

(*y*) *Drew v. Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591.

(*z*) *Browning v. Reane* (1812), 2 Phil. Eccl. Cas. 69; *Hancock v. Peaty* (1867), L. R. 1 P. & D. 335;

36 L. J. Mat. 57.

(*a*) (1882), 21 Ch. D. 615; 48 L. T. 93.

(*b*) (1890), 44 Ch. D. 94; 59 L. J. Ch. 298. And see *Howard v. Digby* (1834), 2 Cl. & F. 634; *Wentworth v. Tubb* (1841), 1 Y. & C. C. C. 171; *Re Macfarlane* (1862), 2 J. & H. 673; *Re Gibson* (1871), L. R. 7 Ch. 52; 25 L. T. 551.

(*c*) 56 & 57 Vict. c. 71.

(*d*) *Jenkins v. Morris* (1880), 14 Ch. D. 674; 42 L. T. 817.

a farm to be impregnated with sulphur, and not fit for himself to live in, he may still be a shrewd man of business, and may even believe that the other side may not know of the impregnation of the farm with the sulphur, and that in consequence he may get a higher price for it than if it was known that it was so impregnated. He may have been perfectly right in his conclusion upon that subject, and the jury may have thought that it was so."

Persons drunk are in the same position as lunatics with regard to Drink. the capacity of contracting.

A person is not bound by a contract which he has entered into Duress. *under duress*, and he may recover what he has paid under duress, or he may enforce the contract, as it is only voidable at his option. It would appear that it is not now necessary for the avoidance of a transaction on this ground that the duress should be of a physical kind, or addressed immediately to the person professing to contract. "I think it must be regarded as the law," said Denman, J., in a recent case (*e*), "that if a man asserts to the father of a debtor that his son is liable to a criminal prosecution, and the father is led by reason of that assertion to suppose that the fact is so, and by reason of that belief is led to give a promissory note, or to bind himself for the payment of a composition by the son, then in that case the transaction is not a fair one. It is *not to be looked at as a voluntary act, but as a case of extortion*, whether the facts are in accord with the assertion or not."

A threat to make a man bankrupt, or to bring a civil action against him, is not such duress as will avoid an agreement made in consequence thereof (*f*). Where a person is liable to be proceeded against both civilly and criminally (*e.g.*, for libel), an agreement entered into with the prosecutor will not *prima facie* be void on the ground of duress (*g*). Although a duress of goods will not avoid a contract, still money may be recovered which has been paid in order to obtain possession of goods wrongfully withheld (*h*). Duress of an agent, through fear that his principal will suffer, will avoid the contract (*i*).

The duress necessary to avoid a contract is *not* that which would create such fear as would impel a person of ordinary courage and

(*e*) *Secar v. Cohen* (1881), 45 L. T. 589; and see *Williams v. Bayley* (1866), L. R. 1 H. L. 200; 35 L. J. Ch. 717.

(*f*) *Powell v. Hoyland* (1851), 6 Ex. 67; 20 L. J. Ex. 82; and see *Ex parte Hall* (1882), 19 Ch. D. 580; 51 L. J. Ch. 556.

(*g*) *Fisher v. Apollinaris Co.* (1875), L. R. 10 Ch. 297; 44 L. J.

Ch. 500. But such an agreement may be void as being against public policy. See *Windhill Local Board v. Vint* (1890), 45 Ch. D. 351; 59 L. J. Ch. 608.

(*h*) *Wakefield v. Newton* (1811), 13 L. J. Q. B. 258; 6 Q. B. 276.

(*i*) *Cumming v. Ince* (1847), 11 Q. B. 112.

resolution to yield to it. "Whenever from natural weakness of intellect or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case." Per Butt, J., in *Scott v. Sebright* (k).

Contracts of Corporations.

[6.] **ARNOLD v. MAYOR OF POOLE.** (1842)

[4 M. & Gr. 860; 12 L. J. C. P. 97.]

Arnold was a solicitor, and did some work for the Poole corporation. But though the corporation had passed a resolution directing the work to be done, and though they knew perfectly well of its progress, yet when the time came to pay they declined to do so, successfully sheltering themselves under the defence that *the contracts of a corporation are not binding unless made under its corporate seal*.

[7.] **CLARKE v. THE CUCKFIELD UNION.** (1852)

[21 L. J. Q. B. 349.]

At a regularly constituted meeting of the board of guardians, an order was given to Mr. Clarke to put up some water-closets in the workhouse, and this order Mr. Clarke forthwith proceeded to execute. When, however, the work was finished, the guardians refused to pay

(k) (1886), 12 P. D. at p. 24; 56 L. J. P. 11. See, also, *Nevill v. Snelling* (1880), 15 Ch. D. 679; 49 L. J. Ch. 777; *In re Leigh* (1888), 40 Ch. D. 290; 58 L. J. Ch. 306.

for it, defending themselves on the technical ground that there was no contract under seal. But it was held that sealing was unnecessary, as the purposes for which the guardians were incorporated obliged them to provide water-closets; and, besides, the contract was an executed one, and it would be the height of injustice that the corporation should keep the benefit of the contract while it impugned its validity.

The contract of a corporation aggregate requires a seal. To this rule, however, there are exceptions for the sake of convenience. *Matters of trifling importance, daily occurrence, or urgent necessity*, may be contracted for without seal (*l*). An inferior servant, for instance, may be engaged by parol; and in a recent case it was held that the Hull corporation might make agreements for the admission of ships into their docks without any sealing being necessary (*m*). Moreover, when a company is incorporated *for trading purposes*, it may make all such contracts as are of ordinary occurrence in that trade, irrespective of the magnitude of the particular transaction, without seal (*n*). But it has been held that a *copper* company cannot sue on a contract not under seal to buy *iron* rails from them (*o*).

Corporation may sometimes contract without seal.

Trading company.

Contracts on behalf of a joint stock company registered under 25 & 26 Vict. c. 89 (the Companies Act, 1862), may now, by virtue of 30 & 31 Vict. c. 131, s. 37, be generally made without seal.

Clarke v. Cuckfield was followed in *Nicholson v. The Bradfield Union* (*p*), which was an action for the price of coals supplied to guardians for the use of their workhouse. "The goods in the present case," said Blackburn, J., "have actually been supplied to and accepted by the corporation. They were such as must necessarily be from time to time supplied for the very purpose for which the body was incorporated, and they were supplied under a contract, in fact, made by the managing body of the corporation. If the defendants had been an unincorporated body, nothing would have remained but the duty to pay for them. We think that the body corporate cannot under such circumstances escape from fulfilling that duty merely because the contract was not under seal."

Coals for work-house.

(*l*) *Ludlow v. Charlton* (1840), 6 M. & W. 815; 8 C. & P. 242; *Church v. Imp. Gas Co.* (1838), 6 A. & E. 846; 3 N. & P. 35.

(*m*) *Wells v. Kingston-upon-Hull* (1875), L. R. 10 C. P. 402; 41 L. J. C. P. 257; and see *Stevens v. Hounslow Burial Board* (1890), 61 L. T. 839; 38 W. R. 236.

(*n*) *South of Ireland Colliery Co. v. Waddle* (1869), L. R. 4 C. P. 617; 38 L. J. C. P. 338.

(*o*) *Copper Miners' Co. v. Fox* (1851), 16 Q. B. 229; 20 L. J. Q. B. 174.

(*p*) (1866), L. R. 1 Q. B. 620; 35 L. J. Q. B. 176.

So it would seem that when a corporation has entirely performed its part of a simple contract, it may sue the other party for non-performance of his part. Thus, a corporation, it has been held, can sue a tenant who has occupied their lands without deed for use and occupation (*g*).

In the recent case of *The Mayor of Oxford v. Crow* (*r*), it was held that in order to render an agreement to surrender a lease granted by a municipal corporation enforceable against the tenant, the agreement must be under the seal of the corporation, or the committee appointed by the corporation to negotiate with the lessee must be appointed under seal, or the agreement must have been ratified by the corporation under seal, or must have been performed in part or acted upon.

Hunt v.
Wimble-
don Local
Board.

But when a statute constituting a corporation provides that its contracts shall be made with sealing, a contract is void unless so made, and, though work has been done, it need not be paid for. Under sect. 174 of the Public Health Act, 1875 (*s*), "every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing, and sealed with the common seal of such authority (*ss*)."
The Wimbledon Local Board provided the first case on the construction of this section (*t*). They verbally directed their surveyor to employ a Mr. Hunt to prepare plans for new offices. When the plans were finished, they were submitted to the board and approved by them; but the proposed offices were never built. The value of the plans was about 90*l.*, and Hunt tried in an action to make the local board pay that amount to him. In this attempt, however, he failed. "Even independently of the statute," said Brett, L. J., "I am of opinion that the plaintiff cannot recover. But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than *directory*. It is what has been called *mandatory*. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this: the Legislature, knowing of the exceptions which existed at the time the statute was passed with regard to small contracts of frequent occurrence

(*g*) *Stafford v. Till* (1827), 4 Bing. 75; and see *Fishmongers' Co. v. Robertson* (1842), 5 M. & G. 131; 12 L. J. C. P. 185; *Kidderminster v. Hardwick* (1873), L. R. 9 Ex. 13; 43 L. J. Ex. 9.

(*r*) [1893] 3 Ch. 535; 69 L. T. 228; approving *Kidderminster v. Hardwick*, *supra*.

(*s*) 38 & 39 Vict. c. 55.

(*ss*) Such contracts must also

"specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed." Sub-sect. 2; and see the recent case of *The British Insulated Wire Company, Limited v. The Prescott Urban District Council*, [1895] 2 Q. B. 463.

(*t*) *Hunt v. Wimbledon Local Board* (1878), 4 C. P. D. 48; 48 L. J. C. P. 207.

which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what *were* small matters, and to say that contracts which the board would not otherwise be authorized to make might be made for amounts less than 50*l.*;—that is to say, that if they were necessary, and under 50*l.*, they should be brought within the recognized exception as to small matters, and that, if they were over 50*l.*, the mere fact of their being over 50*l.* would prevent their coming within the exception.”

Hunt *v.* Wimbledon Local Board was followed in the case of Young *v.* The Mayor of Leamington (*u*), where it was held that a municipal corporation, acting as an urban sanitary authority, were not bound to pay for works executed for them, and of which they had obtained the full benefit, because there was no contract under seal as required by sect. 174. But in another recent case (*x*) (in which a doctor had agreed to attend a number of scarlet fever patients in an encampment outside the town of Grantham at the rate of 5*s.* 3*d.* per tent per day, and had attended till the amount due to him was nearly 100*l.*), it has been held that *the section applies only to a contract where, at the time of entering into it, the parties contemplate the “value or amount” as exceeding 50*l.** “In Hunt *v.* Wimbledon Local Board,” said Lush, L. J., “it must be taken that it was known by all parties that the plans would cost more than 50*l.* In the present case it was not known, at the time when the contract was entered into, how long it would be necessary to employ the plaintiff as a medical man, or how much his charges might amount to. His employment depended upon the continuance of the outbreak of fever.”

In Mellis *v.* Shirley Local Board (1885), 14 Q. B. D. 911, the plaintiffs were employed as engineers to construct works for draining the defendants’ district, and the contract entered into certainly fell within sect. 174. After doing work exceeding 50*l.* in value, the plaintiffs induced the defendants to affix their seal to the contract, which had till then not been done. Mr. Justice Cave held, that part of the work being unperformed when the seal was affixed, and consideration being present, the plaintiffs might sue and recover. The Court of Appeal (16 Q. B. D. 446), in dealing with another point raised in this case, reversed the decision of Cave, J., but did not express any opinion upon his construction of sect. 174 (*y*).

(*u*) (1883), 8 App. Cas. 517; 52 L. J. Q. B. 713; and see Phelps *v.* Upton Snodsbury Highway Board (1885), 49 J. P. 468; 1 C. & E. 524.

(*x*) Eaton *v.* Basker (1881), 7

Q. B. D. 529; 50 L. J. Q. B. 444; and see Att.-Gen. *v.* Gaskill (1882), 47 L. T. 566; 31 W. R. 135.

(*y*) See also 55 L. J. Q. B. 143; 53 L. T. 810.

Young *v.*
Leamington.

Scarlet
fever at
Grantham.

The
Shirley
case.

The
Clifton
School
Board.
case.

In *Scott v. Clifton School Board* (z), the plaintiff, who had been appointed architect of the board, was held entitled under the provisions of 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), to recover payment for his services, notwithstanding that the appointment and orders were not under seal. "The plaintiff," said Mathew, J., "was duly appointed architect to the board under a minute signed by the chairman of the board, and communicated to the plaintiff by the clerk of the board, and the subsequent orders for the execution of the plans were given by minutes of the board properly signed and communicated in a similar manner. It was contended for the defendants that an architect was not such an officer of the board as was contemplated by the regulation, inasmuch as it could not be supposed that his services were intended to be more than temporary. I cannot adopt this construction. By the terms of the minute the plaintiff was appointed the architect of the board, and although after the erection of the schools in the Clifton district his duties might not be onerous, there was no reason to suppose that it was intended that he should not continue to act whenever his services were necessary. Further, the regulation is intended to be one of general application, and in large towns where there were many schools there might well be the necessity for the appointment of an architect as a permanent official of the board."

Implied
contracts.

A corporation may be liable on an implied contract, *e.g.*, for money paid to the use of the corporation (a). Specific performance will be decreed against, or on behalf of, a corporation where there has been part performance by one party, which has been acquiesced in by the other, under such circumstances as would render it inequitable to object to complete on the ground of invalidity (b).

Capacity
to con-
tract.

A corporation has the same powers of contracting as a natural person, so far as they are capable of being exercised by an artificial person (who must always act by an agent) (c); subject to the qualification established by the case of *Ashbury Railway Carriage Co. v. Riche* (d), namely, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly

(z) (1884), 14 Q. B. D. 500; 52 L. T. 105.

(a) *Jefferys v. Gurr* (1832), 2 B. & Ad. 833.

(b) *Crook v. Corporation of Sea-ford* (1871), L. R. 6 Ch. 551; 25 L. T. 1.

(c) See *Burnley Equitable Co-operative Society v. Casson*, [1891] 1 Q. B. 75; 60 L. J. M. C. 59; in which it was held that a contract

of apprenticeship is *not* invalid by reason of the fact that the master to whom the apprentice is bound is a corporation.

(d) (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185; and see *Attorney-General v. G. E. Ry. Co.* (1880), 5 App. Cas. 473; 49 L. J. Ch. 545; *Baroness Wenlock v. River Dee Co.* (1885), 10 App. Cas. 354; 54 L. J. Q. B. 577.

authorize is to be taken as prohibited. Contracts *ultra vires* are void, not for illegality, but for incapacity (e). A company cannot, unless specially authorized, buy shares in another company, nor can it purchase its own shares (f).

Contracts of Married Women.

PIKE v. FITZGIBBON. (1881)

[8.]

[17 CH. D. 454; 50 L. J. CH. 394.]

The plaintiffs were bankers, with whom Lady Louisa Fitzgibbon had kept a separate account which had, during her coverture, become overdrawn. This overdrawing, as the plaintiffs alleged, had been allowed on the ground that Lady Louisa was known by them to have considerable estates settled to her separate use, and had agreed to repay the advances out of her separate estate. The main object of the action was to attach the interest of Lady Louisa in estates to which she was entitled as tenant for life in possession for her separate use, with a restraint on anticipation. The Court of Appeal held that the plaintiffs' claim could only be enforced against so much of the separate estate as was free from any restraint on anticipation to which she was entitled at the time when the engagements were entered into, and which remained at the time when judgment was given. James, L. J., said: "It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable *status* of capacity to con-

(e) See *Newcastle-upon-Tyne (Mayor) v. Attorney-General*, [1892] A. C. 568; 56 J. P. 836.

(f) *In re Barned's Banking Co.*

(1867), L. R. 3 Ch. 105; 37 L. J. Ch. 81; *Trevor v. Whitworth* (1887), 12 App. Cas. 409; 57 L. J. Ch. 28.

tract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. In my opinion, there is no authority for that contention." "It seems to me," said Brett, L. J., "that it is not true to say that equity has recognized or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever said that what is now called a contract is a binding contract upon a married woman. What equity seems to me to have done is this, it has recognized a settlement as putting a married woman into the position of having what is called a separate estate, and has attached certain liabilities not to her but to that estate." And Cotton, L. J., added, "In my opinion that fallacious use of the expression that a married woman having separate estate is regarded as a *feme sole*, has given rise to a great part of the argument on behalf of the plaintiffs."

"In order to construe an Act of Parliament it was laid down long ago in Heydon's case (*g*) that one of the most material things to consider is the state of the law before the Act, and the defect in that law which the Act was intended to remedy. In 1881 the attention of the profession and public had been called to the law with relation to the pecuniary obligations of married women by a decision of the Court of Appeal in *Pike v. Fitzgibbon*. . . . In that state of the law the Married Women's Property Act, 1882, was passed" (*h*). Although, therefore, the law enunciated in *Pike v. Fitzgibbon* was repealed by the Married Women's Property Act, 1882 (*i*), still its *ratio decidendi* should be noted in order to appreciate the present state of the law relating to the capacity of married women to contract, which is now governed by the Married Women's Property Act, 1882, as altered by the Married Women's Property Act, 1893 (*k*).

Rights at
common
law and in
equity.

Excep-
tions to in-
capacity.

At common law a married woman is incapable of making a valid contract; and this general principle was followed in equity, subject to the exception that she could contract so as to bind any property settled to her separate use and unrestrained from anticipation. Her person could not be made liable at law or in equity, but in

(*g*) (1584), 3 Rep. 7 b.
(*h*) Per Kay, L. J., in *Pelton v. Harrison*, [1891] 2 Q. B. 422; 69

L. J. Q. B. 742.
(*i*) 45 & 46 Vict. c. 75.
(*k*) 56 & 57 Vict. c. 63.

equity her property might be subjected to claims under her contracts(*l*). By a deed acknowledged with the concurrence of her husband, a married woman could bind property not settled to her separate use, though, obviously, this was effectual as being the act more of the husband than the wife. So, too, a married woman might acquire rights under a contract where she supplied the consideration, as by giving her separate property, or her personal skill and services(*m*). A woman could not, during coverture, renew a debt which would otherwise be barred by the Statute of Limitations(*n*). The wife of the King of England has the same powers of contracting as a *feme sole*(*o*). Under certain circumstances a married woman had exceptional rights as to contracting, *e.g.*, where the husband was *civiliter mortuus*, or if she carried on a trade within the city of London, she might contract for the purposes of that trade. A further series of exceptions was created by the Divorce and Matrimonial Causes Act, 1857(*p*); a woman divorced from her husband is restored to the position of a *feme sole*; so also in the case of a judicial separation so long as it continues(*q*); and of a wife, deserted by her husband, who has obtained a protection order. But a separation by agreement was not sufficient to give the wife power to bind herself by contracts(*r*). As a general rule, both in law and equity, there could be no valid contract between husband and wife, they being considered as one person; however, in equity, such a contract might be made respecting the wife's separate estate(*s*), or concerning the matrimonial rights.

In the recent case of *McGregor v. McGregor*(*t*), a husband and wife having taken out cross-summonses against each other for assaults, entered into an agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children, and to indemnify the husband

Deed
acknowledged.

Personal
services.

Wife of
the king.

Husband
civiliter
mortuus,
Trading in
London.

Divorce
and Matrimonial
Causes
Act.

Contracts
between
husband
and wife.

McGregor
v. McGregor.

(*l*) *Johnson v. Gallagher* (1861), 3 D. F. & J. 494; 30 L. J. Ch. 298; *Picard v. Hine* (1869), L. R. 5 Ch. 274.

(*m*) See *Jones v. Cuthbertson* (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221.

(*n*) *Pittam v. Foster* (1823), 1 B. & C. 248; 1 Wms. Saund. 172.

(*o*) Co. Litt. 133 a.

(*p*) 20 & 21 Vict. c. 85.

(*q*) But this only applies to such property as she may acquire or which may come to or devolve upon her after the decree. *Waite v. Morland* (1888), 38 Ch. D. 135; 57 L. J. Ch. 655; and see *Hill v.*

Cooper, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423.

(*r*) *Marshall v. Rutton* (1818), 8 T. R. 545; *Meyer v. Haworth* (1838), 8 A. & E. 467; 3 N. & P. 462.

(*s*) *Walrond v. Walrond* (1858), Johns. 18; 28 L. J. Ch. 99.

(*t*) (1888), 21 Q. B. D. 424; 57 L. J. Q. B. 591; *Sweet v. Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; *Bateman v. Ross* (1813), 1 Dow, 235; *Vansittart v. Vansittart* (1858), 4 K. & J. 62; 27 L. J. Ch. 222. See, however, *Cahill v. Cahill* (1883), 8 App. Cas. 140; 49 L. T. 605.

against any debts contracted by her. An action having been brought by the wife against the husband for six weeks' arrears of maintenance under the agreement, it was held, that the husband and wife had power to make a contract for separation by way of compromise of legal proceedings, that the husband's contract to pay for maintenance was binding, and that the action was maintainable.

A married woman is liable at common law for a debt contracted before her marriage; and the Married Women's Property Acts, 1882 and 1893, leave that liability untouched, and judgment can therefore be obtained against her personally (*u*).

Wedding presents.

Wedding presents given to a woman in contemplation of marriage, *primâ facie* belong to her for her separate use (*x*).

Damages for personal injuries to married woman.

Damages awarded to a wife in an action by her husband and herself for personal injuries to her are separate property and cannot, therefore, be attached to answer a judgment debt of the husband (*y*). Alimony received by a wife under a decree for judicial separation from her husband was held, in *Anderson v. Hay* (*z*), *not* to be separate estate, and, therefore, not chargeable by a wife with payment of her debts.

Alimony.

Fraud.

A married woman (like an infant) cannot be sued for a fraud if it is directly connected with a contract, *e. g.*, where she has obtained advances by means of her guaranty, falsely representing herself as sole; and in cases of this kind a married woman is not estopped from pleading coverture by having described herself as *sui juris* (*a*). It was held, however, in the case of *Vaughan v. Vanderstegen* (*b*), that where a married woman had concealed her marriage, and held herself out as a *feme sole*, and thus borrowed money on mortgage, that the fraud thus committed rendered her property liable, notwithstanding she was actually covert at the time of the contract.

Imprisonment.

A married woman without separate property cannot be imprisoned for non-payment of the costs of an action (*c*).

Decree nisi.

The status of a married woman is not affected, or her capacity to contract restored, merely by the pronouncing of a decree *nisi* for the dissolution of her marriage (*d*). A contract invalid because

(*u*) *Robinson v. Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 759.

(*x*) *Re Jamieson, Ex parte Pannell* (1889), 60 L. T. 159; 37 W. R. 464.

(*y*) *Beasley v. Roney*, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408.

(*z*) (1891), 55 J. P. 295.

(*a*) *Liverpool Adelphi Loan Association v. Fairhurst* (1854), 9 Ex. 422; 23 L. J. Ex. 163; *Wright v. Leonard* (1861), 11 C. B. N. S.

258; 30 L. J. C. P. 365; *Arnold v. Woodhams* (1873), L. R. 16 Eq. 29; 42 L. J. Ch. 578; *Cannam v. Farmer* (1849), 3 Ex. 698.

(*b*) (1854), 2 Drew. 363; and see *Re Macintyre* (1887), 21 L. R. Ir. 421; *Liverpool, &c. Assoc. v. Fairhurst, ubi supra*.

(*c*) *In re Walter* (1891), 55 J. P. 551.

(*d*) *Norman v. Villars* (1877), 2 Ex. D. 359; 46 L. J. Ex. 579.

made during coverture does not become valid by subsequent discovery (*e*).

The power given by equity to a married woman of binding by her contracts her separate estate was fully discussed, and many of the authorities cited, in the important case of the London Chartered Bank of Australia *v.* Lemprière (*f*).

London
Chartered
Bank of
Australia
v. Lem-
prière.

Although a married woman is still only liable to the extent of her separate estate unrestrained from anticipation, yet her capacity to contract is *not* confined to dealings with her separate estate (*g*). Recent legislation has, by enlarging her separate estate, greatly increased her power of contracting.

The Married Women's Property Act, 1870 (*h*) (repealed in 1882), enabled a wife to effect a policy of assurance upon the life of herself or her husband, and gave to her as her separate estate various specified forms of property, including wages and money earned by her skill or labour.

Married
Women's
Property
Acts.

The previous Acts of 1870 and 1874 were superseded, and the results of many equity cases dealing with separate estate were greatly enlarged by the Married Women's Property Act, 1882 (*i*). Separate property now consists of (1) all property acquired by a married woman after December 31st, 1882 (*k*); (2) property belonging at the time of marriage to a woman marrying after December 31st, 1882. A married woman's contract, *if entered into before the 5th of December, 1893*, is presumed to be made with respect to and to bind her separate property (*l*); but she must own such property at the time the contract is made, and, if so, her after-acquired separate property is bound (*m*). The onus of proving that a married woman had separate property at the time the contract was made lies on the person seeking to enforce a contract made during

(*e*) *Beckett v. Tasker* (1887), 19 Q. B. D. 7; 56 L. T. 636.

(*f*) (1873), L. R. 4 P. C. 572; 42 L. J. P. C. 49.

(*g*) *Sweet v. Sweet*, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108.

(*h*) 33 & 34 Vict. c. 93.

(*i*) 45 & 46 Vict. c. 75.

(*k*) *Reid v. Reid* (1886), 31 Ch. D. 402; 55 L. J. Ch. 294.

(*l*) But where a married woman entered into a covenant in a mortgage deed for the payment of 400*l.*, and the only free separate estate that she had at the date of the covenant was about 3*l.* or 4*l.*, it was held that there was no presumption of law that the contract was entered into with respect to

and to bind such small separate estate, and that the contract was not binding. *Braunstein v. Lewis* (1891), 65 L. T. 449; 55 J. P. 775. But see and compare *Everett v. Paxton* (1892), 65 L. T. 383; 55 J. P. 230.

(*m*) *Re Shakespear* (1885), 30 Ch. D. 169; 55 L. J. Ch. 44; *Turnbull v. Forman* (1885), 15 Q. B. D. 234; 54 L. J. Q. B. 489; *Conolan v. Leyland* (1884), 27 Ch. D. 632; 54 L. J. Ch. 123; *King v. Lucas* (1883), 23 Ch. D. 712; 49 L. T. 216; *Chapman v. Biggs* (1882), 11 Q. B. D. 27; 48 L. T. 704; *Stogdon v. Lee*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669.

coverture (*n*). The Act does not alter the protection given to property restrained from anticipation, which is still secure from debts arising from contract (*o*).

It was accordingly held, in the recent case of *Pelton v. Harrison* (*p*), that a judgment, in respect of a contractual liability incurred by a woman during coverture, obtained against her after the death of her husband, as against her separate property not subject to any restriction against anticipation, cannot, though she is discovert, be enforced against property which, during coverture, was her separate estate without power of anticipation.

A wife trading apart from her husband is now made subject to the bankruptcy laws (*q*).

But now, by sect. 1 of the Married Women's Property Act, 1893 (*r*), every contract entered into by a married woman, otherwise than as agent, after the 5th of December, 1893,

- (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;
- (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and
- (c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating (*s*).

(*n*) *Palliser v. Gurney* (1887), 19 Q. B. D. 519; 56 L. J. Q. B. 546; *Leak v. Driffield* (1890), 24 Q. B. D. 98; 59 L. J. Q. B. 89.

(*o*) *Draycott v. Harrison* (1886), 17 Q. B. D. 147; 34 W. R. 546. But see *In re Dixon* (1887), 35 Ch. D. 4; 56 L. J. Ch. 773; *Scott v. Morley* (1887), 20 Q. B. D. 120; 57 L. J. Q. B. 43; in which the proper form of judgment against a married woman under sect. 1, sub-sect. (2), of the Married Women's Property Act, 1882, was settled by the Court.

(*p*) [1891] 2 Q. B. 422; 60 L. J. Q. B. 742. And see *Hood-Barrs v. Catheart*, [1894] 2 Q. B. 559; 63 L. J. Q. B. 692, 798; *Loftus v. Heriot*, [1895] 2 Q. B. 212; 11 T. L. R. 467.

(*q*) But see *In re Gardiner* (1887), 20 Q. B. D. 249; 57 L. J. Q. B.

149; *In re Lynes, Ex parte Lester*, [1893] 2 Q. B. 113; 62 L. J. Q. B. 372; and *In re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328; 64 L. J. Q. B. 185.

(*r*) 56 & 57 Vict. c. 63.

(*s*) But see sect. 2, which provides that the Court may, in any action or proceeding instituted by a woman or by a next friend on her behalf, order payment of the costs of the opposite party out of property subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise, as may be just. It should be observed that this section only contemplates the case of a married woman plaintiff: see *Hood-Barrs v. Catheart*, [1894] 3 Ch. 376; 63 L. J. Ch. 793.

A husband may sue his wife for money, which, after their marriage, he has advanced to her on a contract by her, either express or implied, to repay it out of her separate estate (s).

It is important to observe that neither the Act of 1882 nor that of 1893 has imposed a personal liability on a married woman in respect of her contracts, but has simply largely extended the doctrine of separate estate as established by the courts of equity.

Power of Wife to bind Husband to her Contracts.

MANBY *v.* SCOTT. (1659)

[9.]

[1 SID. 112.]

“Scott’s wife departed from him without his consent, and lived twelve years separate from him, and then returned; but he then would not receive her, nor allow her any maintenance, and discharged or forbade tradesmen, particularly the plaintiffs, from trusting her with any wares.” The plaintiffs disregarded the prohibition, sold the wife goods at reasonable prices and fit for her quality, and then sued the husband. They did not succeed, however; and *Manby v. Scott* has been for more than two centuries the leading authority for the principle that the wife’s contract does not bind her husband unless she acts by his authority.

MONTAGU *v.* BENEDICT. (1825)

[10.]

[3 B. & C. 631.]

Mr. Benedict was a London lawyer, whose wife ordered various articles of expensive jewellery from the plaintiff without her husband’s knowledge. In an action by the

(s) *Butler v. Butler* (1886), 16 Q. B. D. 371; 55 L. J. Q. B. 55.

jeweller against the husband, it was argued for the plaintiff, with some plausibility, that the defendant and his wife were in comfortable circumstances of life, though they might not be rich; and that cohabitation was evidence of Benedict's assent to his wife's contract. It was, however, unanimously held that the goods supplied were *not necessities*, and that therefore the defendant could not be compelled to pay for them. "If a tradesman," said Bayley, J., "is about to trust a married woman for what are not necessities, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving."

[11.]

SEATON v. BENEDICT. (1828)

[5 BING. 28; 2 M. & P. 66.]

After the jewellery case, just related, the Benedicts went to live at Twickenham. But Mrs. Benedict continued her extravagance. She became indebted to a local haberdasher for scarves, gloves, laces, and other articles; and finally the tradesman sued her husband.

The goods supplied were unquestionably necessities, but then Mr. Benedict *had always duly furnished his wife with necessary apparel, and knew nothing of her clandestine dealings with Seaton*; and on this ground the plaintiff was disappointed in his expectations of getting paid. "It may be hard," said Best, C. J., "on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The Court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife."

JOLLY v. REES. (1863)

[12.]

[15 C. B. N. S. 628; 33 L. J. C. P. 177.]

Mr. Rees, a country gentleman living near Llanelly, told his wife that he was not going to pay for any drapery or millinery goods she or her daughters might choose to buy on credit. They could do well enough, he said, on the allowance they already had. In spite of this distinct prohibition, Mrs. Rees gave Messrs. Jolly, hosiers and linendrapers at Bath, substantial orders, and they by-and-by sent Mr. Rees a substantial bill. This Mr. Rees absolutely declined to pay, and litigation ensued. The tradesmen *had not known that Mr. Rees had expressly forbidden his wife to incur surreptitious debts*, and the goods they had supplied were what the law calls “necessaries,” so they felt confident of success. The judges, however, decided against them, and thus “carried to its logical results the principle that the wife’s authority to bind her husband is a mere question of agency.”

SMOUT v. ILBERRY. (1842)

[13.]

[10 M. & W. 1.]

A man who had been in the habit of dealing with the plaintiff for meat supplied to his house went to China, leaving his wife and family behind, and died there. It was held that the wife was not liable for goods supplied to her after his death, but before the news of it had arrived, she having had originally full authority to contract, and done no wrong in representing her authority as continuing.

The law of husband and wife in respect of the wife’s power to bind her husband to a contract she has entered into since the marriage is best considered under two heads:—

- (1.) When husband and wife are *living together*.
- (2.) When they are *not*.

Living
together.

(1.) When husband and wife are living together there is a presumption that the wife has her husband's authority to enter into a contract so as to bind him for *necessaries*. But there are several ways in which a husband may rebut the presumption. He may show that at the time when his wife incurred the debt she was already properly supplied with necessaries, or, which is the same thing, with money to purchase them; he may show that he expressly forbade her to pledge his credit(s); he may show that he expressly forbade the plaintiff to trust her; or, lastly, he may show that the credit was given to the woman herself (t).

Moreover, the presumption must now be taken subject to the provisions of the Married Women's Property Act, 1893, that "every contract entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into by her with respect to, and to bind, her separate property" (u).

Debenham
v. Mellon.

Jolly v. Rees was brought under discussion, and approved of, by the House of Lords in the case of Debenham v. Mellon (x).

Separated.

(2.) When husband and wife are living apart, the presumption is that the wife has no authority to pledge her husband's credit. And when the separation is the wife's own fault, when she has left her home without just cause—e.g., to live with an adulterer—this presumption cannot be rebutted. But if it is by mutual consent that husband and wife are living apart, she goes forth with implied authority to pledge his credit for necessaries. If, however, the husband makes his wife a sufficient allowance, or what she accepts as a sufficient allowance, when thus living separate, and actually pays it, the tradesman cannot recover against her husband (y); and it is not material that the tradesman had no notice of this allowance (z). Probably, too, if the lady has money of her own, or if she can earn it, she has no implied authority to pledge her husband's credit (a). A pension during the Crown's pleasure, however, would not exonerate the husband (b). If a wife has been driven out of doors by her husband, or if his conduct at home is so abominable that no decent woman would live under the same roof with him,

(s) *In re Cook, Ex parte Holmes* (1893), 10 M. B. R. 12.

(t) *Bentley v. Griffin* (1814), 5 Taunt. 356; *Metcalf v. Shaw* (1811), 3 Camp. 22. But see *Jewsbury v. Newbold* (1857), 26 L. J. Ex. 247.

(u) 56 & 57 Vict. c. 63, s. 1, repealing sect. 1, sub-sect. 3, of the 1882 Act, 45 & 46 Vict. c. 75.

(x) (1880), 6 App. Ca. 24; 50 L. J. Q. B. 155.

(y) *Eastland v. Burchell* (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500.

(z) *Mizen v. Pick* (1838), 3 M. & W. 481; 1 H. & H. 163.

(a) *Johnston v. Sumner* (1858), 3 H. & N. 261; 27 L. J. Ex. 341; *Clifford v. Laton* (1827), Moo. & M. 101; *Dixon v. Hurrell* (1838), 8 C. & P. 717.

(b) *Thompson v. Hervey* (1768), 4 Burr. 2177.

there is an irrebuttable presumption by law that she has authority to pledge his credit for necessaries (c).

“Necessaries” are *such things as may fairly be considered essential to the decent maintenance and general comfort of a person in the social position of the defendant's wife*. But the wife has no implied authority to run into extravagance, and give orders quite beyond the husband's means. The cases on the subject are numerous. It has been held that a wife may make her husband liable for the cost of exhibiting articles of the peace against him (d), but not of prosecuting him for an assault (e). So he may have to pay the cost of legal advice to the wife respecting an ante-nuptial settlement (f), and of successful divorce proceedings instituted against him (g). But he will not generally be bound to repay a person who has lent money to the woman (h); and if she has induced a person to contract with her by fraudulently representing herself to be unmarried, her husband will not be liable (i). On the other hand, in cases where the wife had really no authority to enter into a contract, the husband may by his conduct ratify and accept the responsibility of it (k).

The wife's authority to pledge her husband's credit is not greater when her husband is mad than when her husband is sane. Where, however, the husband before his insanity has held out his wife as his agent to give orders on his behalf, a tradesman, who continued to supply goods by order of the wife, and in ignorance of the insanity, could recover the price of the goods against the husband (l).

It may be remarked that, to make the man liable on the woman's contracts, it is not necessary that the strict relationship of husband and wife should exist between them. The presumption of authority arises *whenever a man and woman are cohabiting*, if he allows her to assume his name and treats her as part of his family, and

Necessaries,
what are.

Mad
husband.

Cohabitation.

(c) Boulton v. Prentice (1745), Str. 1214; Forristall v. Lawson (1876), 34 L. T. 903.

(d) Turner v. Rookes (1839), 10 Ad. & E. 47; 2 P. & D. 294.

(e) Grindell v. Godmond (1836), 5 Ad. & E. 755; 1 N. & P. 168.

(f) Wilson v. Ford (1868), L. R. 3 Ex. 63; 37 L. J. Ex. 60.

(g) Ottaway v. Hamilton (1878), 3 C. P. D. 393; 47 L. J. C. P. 725.

(h) Knox v. Bushell (1857), 3 C. B. N. S. 334; *In re Cook, Ex parte Vernall* (1893), 10 M. B. R. 8; but see *Harris v. Lee* (1718), 1 P. Wms. 482; *Jenner v. Morris* (1861), 30

L. J. Ch. 261; 3 De G. & J. 45; *Deare v. Soutten* (1869), L. R. 9 Eq. 151; 21 L. T. 523; *Davidson v. Wood* (1863), 32 L. J. Ch. 400; Judicature Act, 1873, s. 24.

(i) *Liverpool Adelphi Loan Ass. v. Fairhurst* (1854), 23 L. J. Ex. 163; 19 Ex. 422; *Wright v. Leonard* (1861), 11 C. B. N. S. 258; 30 L. J. C. P. 365.

(k) *Waithman v. Wakefield* (1807), 1 Camp. 120.

(l) *Richardson v. Dubois* (1869), L. R. 5 Q. B. 51; 39 L. J. Q. B. 69; *Drew v. Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591.

it is no answer to show that the plaintiff knew they were not married (*m*).

The case of *Smout v. Ilberry* is a well-known and sometimes criticised authority. Thirteen years before, in *Blades v. Free* (*n*), it had been held that the executors were not liable in such a case.

A husband is liable to pay the funeral expenses of his deceased wife, but in some cases he will be allowed to retain them out of her estate (*o*).

Ante-nuptial contracts.

The liability of a husband for the ante-nuptial contracts of his wife has undergone considerable change owing to recent legislation, and the present law may be stated shortly as follows: (1) If the parties were married prior to August 9, 1870, the husband is liable on all contracts made by his wife *dum sola*. (2) If married between August 9, 1870, and July 30, 1874, the husband is under no liability for his wife's ante-nuptial debts. (3) If married between July 30, 1874, and January 1, 1883, the liability of the husband extends to the amount of the assets acquired by him from, or in right of, his wife. (4) If married on or after January 1, 1883, then sect. 14 of the Married Women's Property Act, 1882, provides, practically, that the husband's liability is limited to the extent of the property which he has acquired from or through his wife, after deducting any payments made by him in respect of his wife's liabilities (*p*). A husband surviving his wife is probably not liable for her ante-nuptial debts (*q*).

Reg. v. Jackson.

The important decision in the recent case of *Reg. v. Jackson*, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346, may be mentioned here; the Court of Appeal decided that where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights.

(*m*) *Watson v. Threlkeld* (1794), 2 Esp. 637; *Robinson v. Nahon* (1808), 1 Camp. 245; *Ryan v. Sams* (1848), 12 Q. B. 460; 17 L. J. Q. B. 271; *Munro v. De Chemant* (1815), 4 Camp. 215.

(*n*) (1829), 9 B. & C. 167; 4 M. & R. 282. See *Drew v. Nunn*, *ubi sup.*

(*o*) *In re M'Myn* (1886), 33 Ch. D. 575; 55 L. J. Ch. 845; *Bradshaw v. Beard* (1862), 12 C. B. N. S. 344; 31 L. J. C. P. 273.

(*p*) *Beck v. Pierce* (1889), 23 Q. B. D. 316; 58 L. J. Q. B. 516.

(*q*) *Turner v. Caulfield* (1879), 7 L. R. Ir. 347; *Bell v. Stocker* (1882), 10 Q. B. D. 129; 52 L. J. Q. B. 49.

Extent of Agent's Authority.

COX v. MIDLAND COUNTIES RAILWAY CO. [14.]
(1849)

[3 EXCH. 268; 18 L. J. EX. 65.]

A labourer named Higgins took a ticket for the parliamentary train from Whittington, near Birmingham. As he was getting in, the guard signalled the train to start, the consequence of which was that Higgins fell, and the wheels went over his leg. On being picked up he was taken to a neighbouring public-house, and Mr. Davis, the local surgeon to the company, was sent for. Mr. Davis came, pronounced it a bad case, and sent word to the station-master at Birmingham that he should like to have the assistance of Mr. Cox, the eminent hospital surgeon at Birmingham. The station-master, on receiving this message, sent for Mr. Cox, who came immediately to Whittington, and amputated the labourer's leg.

This action was on "assumpsit for work and labour as a surgeon," and the question was whether the station-master had power to bind the company to such a contract. It was held that he had no such power. "Though it might be a benefit," said the Court, "to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power. The employer of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. . . . It would be a serious inconvenience to the public if the rule of law as applicable

not merely to railway companies, but to all partnerships and individuals, as to the extent of authority given to an agent, were relaxed out of a compassionate feeling, which it is difficult not to entertain towards the suffering party, the present plaintiff."

General
and par-
ticular
agents.

Agents are of two classes, general and particular. A *general agent* is one whom his principal has placed in a certain position, and who must, therefore, be taken, no matter what his private instructions may be, to have authority to do all acts which are usually done by persons filling that position. A *particular agent* is one who is entrusted with a particular transaction, and must strictly pursue his instructions. A *general agent* may deviate from his instructions, and yet bind his principal(*r*): not so a *particular agent*; persons dealing with him are bound at their peril to ascertain the extent of his authority(*s*). Thus a *horse-dealer's servant* must be assumed to have the authority to *warrant*, and the master will be bound although he expressly told the servant *not* to warrant; but if an ordinary person tells his servant to sell a horse, and not to give a warranty with it, and the servant then, in defiance of his orders, does give a warranty, it will not bind the master(*t*). But though this distinction between the powers of a general agent and those of a particular agent is perfectly clear in theory, great difficulty arises in practice, and the reader will only get a clear idea of the subject (if at all) by comparing a score or two of the cases.

Warranty
of horse.

General
manager
of railway
company.

Though (as we see in the leading case) a *station-master* may not, it has been held in a later case that the *general manager* of a railway company *may*, pledge his masters' credit for medical expenses(*u*).

Master
of ship.

The master of a ship may pledge the credit of his owners for most purposes incidental to the due prosecution of the voyage(*x*); but

(*r*) See the recent cases of *Watteau v. Fenwick*, [1893] 1 Q. B. 346; 67 L. T. 831; and *Reid v. Rigby*, [1894] 2 Q. B. 40; 63 L. J. Q. B. 451.

(*s*) *Fenn v. Harrison* (1790), 3 T. R. 757; *East India Co. v. Hensley* (1794), 1 Esp. 111; *Levy v. Richardson* (1889), W. N. (1889) 25; *Bryant v. La Banque du Peuple*, [1893] A. C. 170; 62 L. J. P. C. 68.

(*t*) *Brady v. Todd* (1861), 9 C. B. N. S. 592; 30 L. J. C. P. 223; *Howard v. Sheward* (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 42;

Baldry v. Bates (1885), 52 L. T. 620. But see *Brooks v. Hassall* (1883), 49 L. T. 569.

(*u*) *Walker v. G. W. Ry. Co.* (1867), L. R. 2 Ex. 228; 36 L. J. Ex. 123.

(*x*) *Arthur v. Barton* (1840), 6 M. & W. 138; *Beldon v. Campbell* (1851), 6 Ex. 886; 20 L. J. Ex. 342; *Gunn v. Roberts* (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; *The Pontida* (1884), 9 P. D. 177; 53 L. J. P. 78; *The Rhosina* (1885), 10 P. D. 131; 54 L. J. P. 72.

the general manager of a mine has no implied authority to borrow money in an emergency (*y*). Manager of mine.

A ship's husband cannot bind his owners by an agreement to cancel the charter-party (*z*). Ship's husband.

In the recent case of *Payne v. Leconfield* (*a*), it was held that an auctioneer selling a horse did not bind his employer by unauthorized statements which he made respecting it. Auctioneer.

An agent appointed to sell land has, in the absence of express instructions, no authority to sign a contract on behalf of his principal (*b*). Neither has he authority to receive payment on behalf of his principal in any other mode than in cash, in the absence of any usage to the contrary (*c*). Sale of land.

Sometimes the law implies an authority to contract for another so as to bind him from the necessity of the occasion. Thus, in a case in which a man had sent a horse down from King's Cross to Sandy, but had not given any address, or told any one to meet it, it was held that the railway company had authority to incur livery stable expenses on behalf of the owner (*d*). Agency of necessity.

An agent cannot generally employ a sub-agent to do the work of his agency. There are, however, exceptions to this rule. Thus, it was recently held, by the Divisional Court (*e*), that a servant has an implied authority in cases of *sudden emergency* to appoint another person to act as a servant on his master's behalf; the facts were as follows:—While the defendants' omnibus was being driven by their servant, a policeman, being of opinion that the driver was drunk, ordered him to discontinue driving. The driver and the conductor of the omnibus thereupon authorized a third person, who happened to be passing by, to drive the omnibus home on their master's behalf. That person while so driving the omnibus home, negligently drove over the plaintiff and injured him. The defendants were held liable, and, in his judgment, Wright, J., said, "I think that in cases of sudden emergency a servant has an implied authority from his employer to act in good faith according to the best of Agent cannot employ sub-agent. Exceptions. Sudden emergency.

(*y*) *Hawtayne v. Bourne* (1841), 7 M. & W. 595.

(*z*) *Thomas v. Lewis* (1878), 4 Ex. Div. 18; 48 L. J. Ex. 7; *Sandeman v. Scurr* (1860), L. R. 2 Q. B. 86; 36 L. J. Q. B. 58.

(*a*) (1882), 30 W. R. 814; 51 L. J. Q. B. 642; *Stein v. Cape* (1883), 1 C. & E. 63; *Graves v. Masters* (1883), 1 C. & E. 73.

(*b*) *Prior v. Moore* (1887), 3 T. L. R. 624. And see *Hamcr v. Sharp* (1874), L. R. 19 Eq. 108; 41 L. J.

Ch. 53; and *Chadburn v. Moore* (1892), 61 L. J. Ch. 674; 67 L. T. 257.

(*c*) *Pape v. Westacott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222.

(*d*) *G. N. Ry. Co. v. Swaffield* (1874), L. R. 9 Ex. 132; 43 L. J. Ex. 89. See also the recent case of *Montaignac v. Shitta* (1890), 15 App. Cas. 357.

(*e*) *Gwilliam v. Twist*, [1895] 1 Q. B. 557.

his judgment for that employer's interests, subject to this, that in so doing he must violate no express limitation of his authority, and must not act in a manner which is plainly unreasonable." This decision, however, has been reversed by the Court of Appeal (*f*), on the ground that there was *no evidence of necessity*, but Lord Esher, M.R., made the following important observation:—"I am very much inclined to agree with the view taken by Eyre, C.J., in the case of *Nicholson v. Chapman* (*g*), and by Parke, B., in the case of *Hawtayne v. Bourne* (*h*), to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of a master of a ship or the acceptor of a bill of exchange for the honour of the drawer." The fact that the master might have been communicated with was considered sufficient to rebut the suggestion of necessity. So too, by usage of trade, an architect receives implied authority from those who employed him to engage a person to make calculations and take out quantities, and this person may claim remuneration from the employers of the architect, though they were unaware of his existence (*i*).

Custom.

The one-eyed man's case.

Knowledge obtained by an agent when he is acting within the scope of his authority will be imputed to his principal. A good illustration of this rule is furnished by the recent case of *Bawden v. London, Edinburgh, and Glasgow Assurance Co.* (*k*). The plaintiff effected an insurance against accidental injury with the defendants through their agent; the proposal for the insurance, which formed the basis of the contract, contained a statement by the assured that he had no physical infirmity. At the time when he signed the proposal the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants. The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind. It was held that the knowledge of their agent must be imputed to the defendants, and that they were consequently liable on the policy.

Ratification.

Though an agent may have exceeded his authority in such a way that his principal is not bound, still the principal may, if he pleases, ratify the unauthorized contract. *Omnis ratihabitio retrotrahitur et*

(*f*) [1895] 2 Q. B. 84; 64 L. J. Q. B. 474.

(*g*) (1793), 2 H. Bl. 254.

(*h*) (1841), 7 M. & W. 595.

(*i*) *Moon v. Witney Guardians* (1837), 3 Bing. N. C. 814. But, of course, in the case put the plaintiff would have clearly to *prove the*

custom, and it is believed that some doubt exists on that point. See also *Skinner v. Weguelin* (1882), 1 C. & E. 12; *Dew v. Metropolitan Ry. Co.* (1885), 1 T. L. R. 358.

(*k*) [1892] 2 Q. B. 534; 61 L. J. Q. B. 792.

mandato priori equiparatur. Very slight evidence of ratification is sufficient, but the principal cannot ratify part and repudiate the rest. He must take all or none (*l*). It is necessary that the agent should have professed to act as agent merely. If he assumed to act on his own account, there can be no ratification. For this reason (amongst others) it was held that a person whose name had been forged on a promissory note could not ratify the act of the forger, and accept the paternity of the document (*m*).

Questions of agency occasionally arise with regard to goods supplied to a club. In the case of a proprietary club, no one is liable except the proprietor himself. In the case of a members' club, the committee are liable, but not the other members, unless it can be shown that they individually assented to the orders given, or authorized the committee to pledge their credit (*n*). So, too, an individual member of an officers' mess, who has in no way pledged the credit of the mess, is not personally liable for goods supplied to the mess by the orders of the wine caterer (*o*). Goods supplied to club.

A word may be said here about the authority of legal advisers. Lawyers. Besides the conduct of formal proceedings, a solicitor retained in an action has a general authority to act for his client in matters of discretion within his province. He can, for instance, waive irregularities, and can refer or compromise an action. A solicitor stands on a different footing from a barrister, because if he goes wrong, he can be sued for his negligence or unskilfulness, while a barrister cannot. The great cases of *Swinfen v. Swinfen* (*p*), and *Swinfen v. Lord Chelmsford* (*q*), should be consulted on the whole of this subject.

(*l*) *Hovil v. Pack* (1806), 7 East, 164; *Hartas v. Ribbons* (1889), 22 Q. B. D. 254; 58 L. J. Q. B. 187; *Bolton v. Lambert* (1889), 41 Ch. D. 295; 58 L. J. Ch. 425.

(*m*) *Brook v. Hook* (1871), L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(*n*) *Cullen v. Queensbury* (1787), 1 Br. P. C. 396; *Flemyng v. Hector* (1836), 2 M. & W. 172; *Todd v. Emly* (1841), 7 M. & W. 427; *Parr v. Bradbury* (1885), 1 T. L. R. 525; *Overton v. Hewett* (1886), 3

T. L. R. 246; *Steele v. Gourley* (1887), W. N. (1887) 147; 3 T. L. R. 772; *Barnett v. Wood* (1888), 4 T. L. R. 278; *Pilot v. Craze* (1888), 52 J. P. 311; 4 T. L. R. 453.

(*o*) *Hawke v. Cole* (1890), 62 L. T. 658.

(*p*) (1857), 1 C. B. N. S. 364; 26 L. J. C. P. 97.

(*q*) (1860), 5 H. & N. 890; 29 L. J. Ex. 382.

Responsibility of Principal for Fraud of Agent.

[15.]

CORNFOOT *v.* FOWKE. (1840)

[6 M. & W. 358 ; 4 JUR. 919.]

In this case a Leicestershire baronet had been misled about a house. The agent who showed it him had made a misstatement about it, but in perfect good faith ; and there had been equal good faith on the part of his principal. This being so, it was held that the baronet could not get out of his agreement on the ground of fraud. "I think it impossible," said Alderson, B., "to sustain a charge of fraud, when neither principal nor agent has committed any: the principal, because, though he knew the fact, he was not cognisant of the misrepresentation being made, nor even directed the agent to make it ; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*."

It should be stated, however, that Lord Abinger, C. B., in a learned and exhaustive judgment, dissented from the view of the majority, saying that it was "a matter that appeared to him, but for their opinion, too plain to admit of a doubt."

Leading
case of
doubtful
authority,

It is far from chimerical to suppose that the case of *Cornfoot v. Fowke* will some day be overruled in favour of the view there unsuccessfully contended for, and of the principle that if a man, having no knowledge whatever on the subject, takes on himself to represent a certain state of facts to exist, he does so at his peril (*v.*). The recent case of *Ludgater v. Love* (*s*) (where the principal's son innocently said what his father told him to say about the condition of some sheep he was selling) is undoubtedly

but not
quite over-
ruled by
Ludgater
v. Love.

(*v.*) See *Fuller v. Wilson* (1842), 3 Q. B. 58 ; 2 G. & D. 460 ; *Derry v. Peek* (1889), 14 App. Cas. 337 ; 58 L. J. Ch. 864.

(*s*) (1881), 44 L. T. 694 ; 45 J. P.

600. See *Blackburn v. Vigors* (1887), 12 App. Cas. 531 ; 57 L. J. Q. B. 114 ; *Blackburn v. Haslam* (1888), 21 Q. B. D. 144 ; 57 L. J. Q. B. 479.

another nail in the coffin of the leading case; but *Ludgater v. Love* is to be distinguished from *Cornfoot v. Fowke* on the ground that in the former case the jury expressly found that the defendant *fraudulently concealed from his son* that the sheep had the rot, with a view to his representing them as sound and getting the best price for them.

But whatever doubt there may be as to the liability of a fraudulent principal for the acts of an innocent agent, there would seem to be none now as to the liability of an innocent principal for the fraud of his agent. In order, however, to make the principal liable, the fraud of the agent must be committed within the scope of his authority and for the benefit of the principal (*t*). In such cases, *the fraud of the agent is the fraud of the principal*, so that the latter cannot take any advantage or benefit from it, and, on the other hand, is liable to an action for it. For authority for this proposition, reference may be made to the cases of *Udell v. Atherton* (1861), 7 H. & N. 172; 30 L. J. Ex. 337; *Barwick v. English Joint Stock Bank* (1867), 36 L. J. Ex. 147; L. R. 2 Ex. 259; *Blake v. Albion Life Assurance Society* (1878), 4 C. P. D. 94; 48 L. J. Q. B. 169; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; *Weir v. Bell* (1878), 3 Ex. Div. 238; 47 L. J. Q. B. 704; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31; *Swire v. Francis* (1877), 3 App. Cas. 106; 47 L. J. P. C. 18; *Chapleo v. Brunswick Building Society* (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; *Mullens v. Miller* (1883), 52 L. J. Ch. 380; and *Baldry v. Bates* (1885), 52 L. T. 620.

Fraud of agent fraud of principal.

An agent is not allowed to make a surreptitious profit out of his agency, but must account to his employer for everything he receives. Thus it was recently held in the case of *Skelton v. Wood* (*u*), that a broker is not entitled to recover from his principal differences on stock which he purports to carry over on his behalf, when there is no existing contract between such broker and any third party available for the principal at the time when such differences arise. Nor can an agent maintain an action to recover such illegal profit or commission from the person who has promised it him. Moreover, if I discover that my agent is selling me to the other side in this way—no matter how many trade customs can be produced in support of such dishonesty—I am generally entitled to rescind the contract. See, on this subject, the cases of *Panama, &c. Co. v. Indiarubber, &c. Co.* (1875), L. R. 10 Ch. 515; *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594; *Williamson v. Barbour* (1878), 9 Ch. D. 529; 50 L. J. Ch.

Bribes to agents.

(*t*) *Thorne v. Heard*, [1894] 1 Ch. 599; 63 L. J. Ch. 356.

(*u*) (1894), 71 L. T. 616; 15 Rep. 382.

147; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; 47 L. J. Ch. 30; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319; 43 L. T. 676; *Lister v. Stubbs* (1890), 45 Ch. D. 1; 59 L. J. Ch. 570; and *Corporation of Salford v. Lever*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39.

Directors. As to secret profits received by a director of a company, see *Archer's case*, [1892] 1 Ch. 322; 61 L. J. Ch. 129.

Undisclosed Principals, &c.

[16.] **PATERSON v. GANDASEQUI.** (1812)

[15 East, 62.]

Gandasequi, a Spanish merchant, made up his mind that the foreign market could do with some silks and satins. He accordingly set sail for England, and, on reaching London, went to Larrazabal and Co., certain agents in the City, and commissioned them to buy a quantity of goods for him. Larrazabal and Co. proceeded to execute the commission, and asked Paterson and Co., a great hosiery firm, to send certain specified articles with terms and prices. Now, Paterson and Co. knew Larrazabal and Co., and had perfect confidence in them, but Gandasequi they did not know, and had no confidence in. Therefore, though they sent the goods, and though they knew perfectly well that they were really for Gandasequi, and that Larrazabal and Co. were merely his agents in the matter, yet for all that they booked the goods as sold to Larrazabal and Co. This was unfortunate, because it happened that Gandasequi was really a more substantial person than his agents, who shortly afterwards became bankrupt. Paterson was not disposed to be content with the fraction of his debt, which,

as a creditor in bankruptcy, he might have got from Larrazabal and Co., and with the object of getting the whole of his money, sued Gandasequi.

But it was held that, if the seller of goods knows that the person he deals with is only an agent, *and knows also who his principal is*, and in spite of that knowledge chooses to give the credit to the agent, he must stand by his choice, and cannot sue the principal.

DAVENPORT *v.* THOMSON. (1829)

[17.]

[9 B. & C. 48.]

A person named McKune carried on at Liverpool the business of a “general Scotch agent.” One day he received a letter from some clients of his in Scotland to the following purport:—

“*Dumfries, 29th March, 1823.*

“*Dear Sir,—Annexed is a list of goods which you will please procure and ship per Nancy. Memorandum of goods to be shipped:—twelve crates of Staffordshire ware, crown window glass, ten square boxes, &c., &c.*

“*Yours, &c.,*

“*THOMSON AND CO.*”

On receiving this letter, McKune went to the shop of Davenport and Co., who were glass and earthenware dealers, and had an interview with their head partner. He did not pretend to be buying for himself. He said he had received an order to purchase some goods for some clients in Scotland, *but he did not mention their name*, and the Davenports did not ask for it. They sold about 200*l.* worth of goods, and debited McKune, though they knew perfectly well he was only an agent. Then McKune failed without having paid Davenport and Co.

This was an action by Davenport and Co. against McKune's principals, Thomson and Co., who denied their liability on the ground that Davenport and Co. had debited McKune, and could, therefore, look only to him for payment. This view, however, was not adopted by the Court, and Thomson and Co. were made to pay, the principle being that, *as the name of the real buyer had not been disclosed to them by the agent, the sellers had had no opportunity of writing him down as their debtor.*

Three
cardinal
rules.

The chief rules relating to transactions with an agent, who acts with authority to bind his principal, are these:—

1. If you contract with a man whom you know to be an agent, and who names his principal to you at the time of the contract, there is *primâ facie* no contract at all with the agent. The principal is the proper person to sue and to be sued. Thus in the recent case of *Ellis v. Goulton* (*x*), on the sale of premises by auction, the purchaser paid a deposit to the vendor's solicitor as agent for the vendor; the sale went off through the default of the vendor, and the purchaser brought an action to recover the deposit from the solicitor; but it was held that the action could not be maintained as the payment of the deposit to the solicitor was equivalent to payment to the vendor, and, therefore, the action should have been brought against the latter. Of course the agent may, if he chooses, render himself liable as a contracting party, or there may from the very nature of the case be also a remedy against him, as where he himself has an interest in the subject-matter of the contract. And it may be, as we have seen, that credit may be given to the agent, and to the agent alone, to the exclusion of all remedy against the principal.

Foreign
merchant
buying
goods in
England
through
agent.

There is, however, an exception to the general rule, founded on public convenience of mercantile usages, namely, that where a merchant abroad buys goods in England through an agent, the seller, in the absence of evidence of express authority to the agent to pledge his foreign constituent's credit, *contracts with the agent*, and there is no contract or privity between him and the foreign principal (*y*). But the application of this rule may be excluded by circumstances which establish a privity between the foreign and

(*x*) [1893] 1 Q. B. 350; 62 L. J. Q. B. 232.

(*y*) *Hutton v. Bulloch* (1874), L. R. 9 Q. B. 572; 30 L. T. 648;

Die Elbinger, &c. v. Claye (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151.

English principals, as, for instance, was the case in *Malcolm v. Hoyle* (z).

There may also be noticed a technical rule that those persons only can sue or be sued upon an indenture, who are described in it as parties thereto (a). And in consequence of this rule, when a deed purports to be the deed of the agent (b), and the principal is not named as a party, the latter cannot sue or be sued upon the indenture. Indentures.

2. When you deal with a man whom you know to be an agent, but who does not name his principal to you at the time of the contract, the agent is *prima facie* liable on the contract as well as the principal, since you cannot be expected to give credit exclusively to a person whose very name is unknown to you. But where it clearly appears on the face of the contract that the agent is not pledging his personal credit, although he may not disclose the name of his principal, still upon a contract so framed the agent could not be personally liable. Evidence of custom would, however, be admissible (c) to show that it was intended that the agent should himself be bound. Thus, where a charter-party was expressed to be made (d) between the plaintiffs and the defendants “as agents to merchants,” and the defendants’ signature to the contract was expressed to be by them “as agents to merchants,” evidence was tendered on the part of the plaintiffs, and admitted, of a trade usage that, if the principal’s name is not disclosed within a reasonable time after the signing of the charter-party, in such case the brokers shall be personally liable. Evidence, however, would not have been admitted to prove a custom that the defendant should be liable under all circumstances, inasmuch as that would be to contradict the document itself, and not merely to add a term which is not inconsistent with any term of the contract (e). Evidence of custom admissible to charge agent.

When a man signs a contract in his own name without any qualification, even although in the body of the document there may be some expressions tending to show that he is acting for another, he must nevertheless be taken to have intended to bind himself as principal (f). In order to exempt himself he must make it appear Signing without qualification.

(z) (1894), 63 L. J. Q. B. 1. And see *Crossley v. Magniae*, [1893] 1 Ch. 594; 67 L. T. 798.

(a) *Southampton v. Brown* (1827), 6 B. & C. 718.

(b) *In re Pickering’s claim* (1871), L. R. 6 Ch. 525; affirming 21 L. T. 178.

(c) *Humfrey v. Dale* (1857), E. B. & E. 1004; 26 L. J. Q. B. 137; *Pike v. Ongley* (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373.

(d) *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260; *Hutcheson v. Eaton* (1884), 13 Q. B. D. 861; 51 L. T. 816.

(e) See *Barrow v. Dyster* (1884), 13 Q. B. D. 635; 51 L. T. 573.

(f) *Paice v. Walker* (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109; *Southwell v. Bowditch* (1876), 1 C. P. D. 371; 45 L. J. C. P. 630; *McCollin v. Gilpin* (1880), 6 Q. B. D. 516; 49 L. J. Q. B. 558.

clearly (*g*) on the face of the contract that he did not intend to be liable as a principal.

Liability
of re-
ceivers.

As to the personal liability on contracts of a receiver appointed under a debenture trust deed, see *Owen v. Cronk* (*h*), and of a receiver appointed by the Court, see *Bent v. Bull* (*i*).

Agent
may limit
his respon-
sibility.

But the agent may limit his responsibility by the insertion of special provisions. Thus, in a well-known case (*k*), a charter-party was executed by one Yglesias, as agent for the freighter, and his signature was unqualified, but the instrument contained a proviso that the agent's liability should cease as soon as the cargo was shipped. The Court held that Yglesias was the contracting party and liable upon the contract, but that, nevertheless, it was quite competent for him to say, "I am making this contract for an unknown principal, and I will not be liable after the cargo is shipped."

Election
within
reasonable
time after
discovery.

3. When you deal with a man who, though really an agent, is not known by you to be such at the time that you enter into the contract, the undisclosed principal is, as a rule, bound by the contract (*l*), and entitled to enforce it as well as the agent with whom you made the contract in the first instance. But if you determine to sue the principal on the contract, you must make your election to do so within a reasonable time after discovering that there was really a principal behind the scenes (*m*); otherwise you will be estopped from pursuing any remedy except that against the agent with whom you originally contracted. So, too, if you deal with the agent so as to lead the principal to believe that the agent only will be held liable, and thus prejudice the principal in his relations with his agent (*n*).

Agent
contract-
ing dis-
tinctly as
if prin-
cipal.

Humble *v.*
Hunter.

It should, moreover, be noticed that where an agent has contracted in such terms as to lead anyone to suppose that he was himself the true and only principal, the principal cannot come forward and take advantage of the contract made for him by his agent. In one case (*o*) a widow brought an action on a charter-party for freight, &c. She was the owner of a ship called the *Ann*. But on the production of the charter-party it appeared that her

(*g*) *Hough v. Manzanos* (1879), 4 Ex. Div. 104; 48 L. J. Ex. 398; and see *Ogden v. Hall* (1879), 40 L. T. 751.

(*h*) [1895] 1 Q. B. 265.

(*i*) [1895] 1 Q. B. 276.

(*k*) *Oglesby v. Yglesias* (1858), E. B. & E. 930; 27 L. J. Q. B. 356; and see the recent case of *Lilly v. Smales*, [1892] 1 Q. B. 456; 40 W. R. 544.

(*l*) See *Watteau v. Fenwick*,

[1893] 1 Q. B. 346; 67 L. T. 831.

(*m*) *Smethurst v. Mitchell* (1859), 1 E. & E. 622; 28 L. J. Q. B. 241; *Curtis v. Williamson* (1874), L. R. 10 Q. B. 57; 44 L. J. Q. B. 27.

(*n*) *Wyatt v. Hertford* (1802), 3 East, 147; *Irvine v. Watson* (1880), 5 Q. B. D. 414; 49 L. J. Q. B. 239.

(*o*) *Humble v. Hunter* (1848), 12 Q. B. 310; 17 L. J. Q. B. 350.

son, who had acted as her agent in the making thereof, had signed an agreement running thus: "It is mutually agreed between C. T. Humble, Esq., owner of the good ship or vessel called the *Ann*, and Jameson Hunter," &c. It was held that, as the document itself described the son as "owner," the plaintiff must be considered as bound by this assertion of title to the subject-matter of the contract, and that she could not take the benefit of the contract.

There are dicta contained in the judgments in *Davenport v. Thomson* which suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal.

But a more accurate statement of the law is contained in the judgment of Parke, B., in *Heald v. Kenworthy* (*p*). "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money, on the faith that the agent and the seller have come to a settlement on the matter; or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." This was the view adopted by the Court of Appeal in a recent case (*q*) where the defendants had employed Conning, a broker, to buy oil for them. The broker accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who these principals were. The terms of the sale were "cash on or before delivery," but there is no invariable custom in the trade to insist on prepayment. The oil was delivered to Conning by the plaintiffs, but not paid for, and the defendants, not knowing that the plaintiffs had not been paid, paid Conning the amount due for the oil. It was held that the fact of the defendants having paid the broker did not preclude the plaintiffs from suing for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker. And the Court considered that under the circumstances the man's omission to insist on prepayment was not such conduct as would reasonably induce such belief. So, in the recent case of *Davison v. Donaldson* (*r*), where the action was brought against a part owner of a ship for the price of beef and stores for the ship supplied on the order of a man named Tate, who

Heald v. Kenworthy.

Irvine v. Watson.

Davison v. Donaldson.

(*p*) (1855), 10 Ex. 739; 24 L. J. Ex. 76.

(*r*) (1882), 9 Q. B. D. 623; 47 L. T. 564.

(*q*) *Irvine v. Watson, ubi sup.*

was ship's husband and managing owner, the defendant was held liable, although several years had elapsed, during which the plaintiff had applied to Tate for payment, and the defendant had more than once settled accounts with Tate. "I think," said Bowen, L.J., "that the plaintiff must succeed, on the ground that there was *no misleading conduct*."

Sct-Off against Factor's Principal.

[18.]

GEORGE v. CLAGETT. (1797)

[7 T. R. 359; 2 Esp. 557.]

Messrs. Rich and Heapy carried on business in woollen cloths, not only on their own account, but also as factors for other people; and as they carried on all their business at the same warehouse, it would not be obvious when they were acting as principals and when as agents. Messrs. Rich and Heapy happened to have in their possession as factors a large quantity of goods belonging to Mr. George, a clothier of Frome, which goods were in their warehouse along with goods belonging to themselves. It happened just then that Messrs. Clagett were in want of such goods. They held a bill of exchange for 1,200*l.*, accepted by Rich and Heapy, and as they saw no likelihood of getting paid, they thought it would not be a bad plan to buy goods from them on credit, and deduct the amount of the bill from the purchase-money. Messrs. Rich and Heapy, accordingly, sold them a quantity of goods, making out a bill of parcels for the whole in their own names, and Messrs. Clagett fully believed that they were dealing with principals. The goods were taken out of one general mass in the warehouse, so that a large portion of them really belonged to the clothier of Frome.

This was an action by that person against Messrs. Clagett

for the price of the portion of the goods which belonged to him, and which he said Messrs. Rich and Heapy had sold as his agents. Messrs. Clagett said they did not know that Rich and Heapy were his agents or anybody else's agents, and claimed to have the same right of set-off (that is to say, of deducting the above-mentioned debt) against him which they would have had against them. In this contention they were successful.

"In all these cases of set-off," says Lord Truro in a later case^(s), Principle of leading case.
 "the law endeavours to meet the real honesty and justice of the case. Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller."

These words put the rule and its reason very clearly. And Lord Truro goes on,—

"But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case there would be no honesty in allowing the purchaser to set off a bad debt at the expense of the principal"^(t).

As to this last point, the effect of the decisions seems to be that although the defendant had the *means of knowing* that he was dealing with an agent, and did not make use of them, he is still entitled to his right of set-off. But, of course, the fact that a man has ready to hand the *means of knowing* a thing is evidence, to some extent^(u), that he *actually does know* it. Means of knowing does not amount to actual knowledge.

We see, then, that if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off against the concealed principal any demand he might have set off against the factor. But it has been held, where the factor has meanwhile become bankrupt, that a mutual credit not amounting to ordinary set-off could not be set up in an action brought by the Mutual credit.

^(s) *Fish v. Kempton* (1849), 7 C. B. 687; 18 L. J. C. P. 206; and see the recent cases of *Maspons v. Mildred* (1882), 39 W. R. 862; and *Montagu v. Forward*, [1893] 2 Q. B. 350; 69 L. T. 371.

^(t) See *Blackburn v. Mason* (1893), 4 R. 297; 68 L. T. 510.

^(u) *Borries v. Imp. Ott. Bank* (1873), L. R. 9 C. P. 38; 43 L. J. C. P. 3.

Unliquidated damages.

unknown principal against the buyer (*x*), that is to say, that the mutual credit clauses of the bankrupt law did not apply as against the principal. This decision has been thought to establish that the principle of *George v. Clagett* does not extend to a set-off of unliquidated damages; but it cannot be extended to support such a wide proposition. The true deduction would seem to be that the rule in *George v. Clagett* only applies to what can be said to be a proximate motive in dealing with the factor; and the Court was of opinion that his bankruptcy, and the mode thereon of settling with his assignees, could not be taken to be so contemplated.

Warner v. M'Kay.

Of course, where a factor sells *as factor*, the purchaser cannot set off, in an action by the principal for the price of the goods, a debt due to him from the factor. But, in a case where the purchaser *bona fide* believed (*y*) that the factor was selling to repay himself advances, the purchaser was allowed to set off payments on account made by him to the factor. Whatever may have been the ground of this decision, and whether or not it is capable of being supported, it must not be taken (*z*) to break in upon the principles already stated.

Knowledge of agent is knowledge of principal.

It must, too, be observed that where the buyer employs an agent to act for him in the matter of the purchase, and this agent of the purchaser has knowledge that the goods are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is held to be the knowledge of the buyer himself (*a*); so that in an action by the factor's principal against the purchaser for the price of the goods, the defendant is affected by such knowledge of the agent, and is not, therefore, entitled to set off a debt due to him from the factor against the plaintiff's claim.

Principle of leading case not applicable to brokers.

The principles enunciated above with regard to the right of set-off, though applicable to the case of a factor, must not be considered to apply in any way to the case of a broker, whose position differs from that of a factor in many important particulars. A broker is not trusted with the possession of the goods to be sold, and he ought not to sell in his own name (*b*). The principal, then, who trusts a broker has a right to expect that he will not sell in his own name, and the purchaser could not well be led to believe that the

(*x*) *Turner v. Thomas* (1870), L. R. 6 C. P. 610; 40 L. J. C. P. 271.

(*y*) *Warner v. M'Kay* (1836), 1 M. & W. 591.

(*z*) See per *Cresswell, J.*, in *Fish v. Kempton, sup.*

(*a*) *Dresser v. Norwood* (1864),

17 C. B. N. S. 466; 34 L. J. C. P. 48; and see *Blackburn v. Haslam* (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479; and *Bawden v. London, Edinburgh, and Glasgow Assoc. Co.*, *ante*, p. 42.

(*b*) *Baring v. Corrie* (1818), 2 B. & Ald. 137.

broker was the actual owner of the goods, which were to form the subject-matter of the sale.

In *Stevens v. Biller* (c), it was held that an agent who is entrusted with the possession of goods for the purpose of sale does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price and to sell in the principal's name. "A factor," said Cotton, L. J., "can sell in his own name as against his principal, whatever restrictions there may be in his instructions. It is not essential, for the purpose of giving him a general lien, that he should be free from any restriction as to the name in which he shall sell the goods. No cases were cited before us for such a proposition, and a case was cited before Mr. Justice Chitty to the contrary—*Ex parte Dixon* (d). That case shows that if a factor sells in his own name, although contrary to the instructions of his principal, it will give a right of set-off as between the purchaser and factor; it will not take away his character of factor."

The *status* of a factor, as defined by the rules of common law, and of mercantile usage, may be stated briefly as an agent to whom goods are consigned for the purpose of sale, and who has possession of the goods, and is authorized to sell them in his own name upon such terms as he thinks fit, with power to receive the price and give a good discharge to the purchaser. This, however, has, for the purpose of increasing the freedom of mercantile dealings, been considerably enlarged by the "Factors Acts" (e), which were repealed and consolidated with amendments by the Factors Act, 1889 (52 & 53 Vict. c. 45). This Act, after defining various expressions subsequently used, proceeds as follows:—

"2.—(1) Where a mercantile agent (f) is, with the consent of the owner, in possession (g) of goods or of the documents of title (h)

Definition of factor at common law.

Factors Act, 1889.

Powers of mercantile agent with

(c) (1883), 25 Ch. Div. 31; 53 L. J. Ch. 249.

(d) (1876), 4 Ch. Div. 133; 46 L. J. Bk. 20.

(e) (1824), 4 Geo. 4, c. 83; (1826), 6 Geo. 4, c. 94; (1842), 5 & 6 Vict. c. 39; (1877), 40 & 41 Vict. c. 39.

(f) Defined by sect. 1 as an agent "having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods." See *Hastings v. Pearson*, [1893] 1 Q. B. 62; 62 L. J. Q. B. 75.

(g) Possession is defined by sect. 1

as where "the goods or documents are in his actual custody or are held by any other persons, subject to his control, or for him, or on his behalf."

(h) By sect. 1, documents of title include any "bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

respect to
disposition
of goods.

to goods, any sale, pledge (*i*), or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

“(2) Where a mercantile agent has, with the consent of the owner, been in the possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent, provided that the person taking under the disposition has not, at the time thereof, notice that the consent has been determined.

“(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

“(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of
pledges of
documents
of title.

“3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for
antecedent
debt.

“4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights ac-
quired by
exchange
of goods
or docu-
ments.

“5. The consideration necessary for the validity of a sale, pledge, or other disposition of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

(*i*) “Pledge” includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance,

or of any further or continuing advance, or of any pecuniary liability. (Sect. 1.)

“ 6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent. Agreements through clerks, &c.

“ 7.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. Provisions as to consignors and consignees.

“ (2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

“ 8. Where a person having sold goods, continues, or is, in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same *(k)*. Disposition by seller remaining in possession.

“ 9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner *(l)*. Disposition by buyer obtaining possession.

“ 10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned Effect of transfer of documents on vendor's lien

(k) Reproduced by sect. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). And see *Nicholson v. Harper*, [1895] 2 Ch. 415; 11 T.

L. R. 435.

(l) As to the effect of this section on *hire and purchase* agreements, see *post*, p. 231.

or right of stoppage *in transitu*. transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Mode of transfer-
ring docu-
ments. “11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.”

The following cases may be usefully referred to, although decided prior to this Act, namely:—*Cole v. The North Western Bank* (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 233; *City Bank v. Barrow* (1880), 5 App. Cas. 667; 43 L. T. 393; *Heyman v. Flewker* (1863), 13 C. B. N. S. 519; 32 L. J. C. P. 132; *Kaltenbach v. Lewis* (1885), 10 App. Cas. 617; 55 L. J. Ch. 58; *Hugill v. Masker* (1889), 22 Q. B. D. 364; 58 L. J. Q. B. 171; *Johnson v. Crédit Lyonnais Co.* (1877), 3 C. P. D. 32; 47 L. J. C. P. 241.

Agent exceeding Authority Liable in Contract.

[19.]

COLLEN *v.* WRIGHT. (1857)

[8 E. & B. 647; 27 L. J. Q. B. 215.]

Mr. Wright was the land agent of a gentleman named Dunn Gardner, and, professing to have authority to do so, he made an agreement with a Mr. Collen for the lease to him for twelve and a-half years of a farm of Dunn Gardner's. On the strength of this agreement Collen entered on the enjoyment of the farm; but he soon found that there was a serious difficulty in the way. Mr. Dunn Gardner refused to execute any such lease, saying that he had never authorised Mr. Wright to agree for a lease for so long a term; and this proved to be the fact.

This was an action by the disappointed farmer against the executors of the agent who had led him wrong, and the main question was whether Wright's assuming to act as Dunn Gardner's agent to grant the lease amounted to a

contract on his part that he had such authority. This was the view ultimately adopted, so that Wright's executors became liable to Collen.

When a man enters into a contract representing himself as agent for a person named at the time the contract was made, the law will not allow him to shift his position and sue as principal on the contract, "declaring himself principal and the other a creature of straw." This was clearly laid down in *Bickerton v. Burrell* (*m*), *Bickerton v. Burrell*, where the plaintiff had, at a sale by auction, signed a memorandum of purchase as agent for a named principal, and, then, in an action to recover the deposit he had paid to the auctioneer, sought to give evidence that he was really the principal in the matter. It is true that a Court of Equity (*n*) has taken a view adverse to the decision in *Bickerton v. Burrell*, but the authority of the case in equity has been much questioned.

It must, too, be carefully noticed that, when the contract has been in part performed by the plaintiff acting as an agent (*o*), and that part performance has been accepted by the defendant with full knowledge that the plaintiff was not the agent but the real principal, then the action is clearly maintainable. Acceptance of part performance.

The true principle of the cases would seem to be, that, on the professed agent giving the other party notice of his real position before action brought, it is open to the other party either to repudiate the contract altogether, or to ratify it expressly in words or impliedly by his conduct.

Although the circumstances may be such that the professed agent cannot sue upon the contract, nevertheless, as we have seen from *Collen v. Wright*, he is liable for the damages sustained by reason of the assertion of authority being untrue. He cannot, indeed, be sued *upon the contract itself*, but he is liable on an implied warranty of authority (*p*). Agent liable as on implied warranty.

Cases often arise where a contract is signed by one who professes to be signing "as agent" for a named principal, but *where there is* No principal really existing.

(*m*) (1816), 5 M. & S. 383.

(*n*) *Fellows v. Gwydyr* (1832), 1 Russ. & M. 83.

(*o*) *Rayner v. Grote* (1846), 15 M. & W. 359; 16 L. J. Ex. 69.

(*p*) See also *Cherry v. Colonial Bank of Australasia* (1869), L. R. 3 P. C. 24; *Richardson v. Williamson* (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 115; *Beattie v. Ebury* (1872), L. R. 7 Ch. 777; 7 H. L. 102; *Weeks v. Propert* (1873), L.

R. 8 C. P. 427; 42 L. J. C. P. 129; *Ex parte Panmure* (1883), 24 Ch. D. 627; 53 L. J. Ch. 57; *Firebank v. Humphreys* (1886), 18 Q. B. D. 54; 56 L. J. Q. B. 57; *Meek v. Wendt* (1888), 21 Q. B. D. 126; W. N. (1889) 14; 59 L. T. 558; *Haigh v. Stuart*, W. N. (1890) 213; *Elkington v. Hurter*, [1892] 2 Ch. 452; 61 L. J. Ch. 514; and *Lilly v. Smales*, [1892] 1 Q. B. 456; 40 W. R. 544.

no such principal existing at the time, so that the contract would be altogether inoperative unless binding upon the person who signed it; as, *e.g.*, where the alleged principal is entirely fictitious, or where a man enters into an engagement on behalf of a company which has not, at the time of the contract, obtained any legal existence (*q*). In such cases, the professed agent is personally bound by the contract, it being assumed, on the principle *ut res magis valeat quam pereat*, that it was in the contemplation of the parties at the time of the making of the contract that the person signing it would be bound thereby. Moreover, in such cases, there would, as a general rule, seem no reason, in the absence of fraud, why the professed agent should not *sue* on the contract in his own name, at any rate in respect of executed contracts.

Ratification.

But it must be noticed that, when there is no principal in existence at the time of the contract, there can be no subsequent ratification. Thus, in an action (*r*) on a cheque drawn by the promoters of a company before the company had acquired any legal existence, it was sought to relieve the promoters from responsibility by showing a subsequent ratification and adoption by the company. This contention was, however, unsuccessful, as “ratification can only be by a person ascertained at the time of the act done, by a person in existence either actually or in contemplation of law.”

Agent not disclosing name of principal.

There yet remains one case of professed agency to be considered, namely, where a man holds himself out as agent, but does *not make known the name of his alleged principal*; as, where (*s*) a charter-party was expressed to be made between the defendant as owner of the ship, of the one part, and “G. Schmaltz & Co. (agents of the freighters) of the other part.” It was held that, notwithstanding the terms of the charter-party, Schmaltz & Co. might prove that they were in reality the freighters, and their own principals; and, on proof of their being so, were entitled to recover in their own name. And, conversely, no doubt, Schmaltz & Co. might have been sued on the contract, on proof being given that they were really the principals in the transaction. We have seen from the notes to *Paterson v. Gandasequi* that had there been in truth any freighters behind the back of Schmaltz & Co., this firm could neither have sued nor been sued on the charter-party, inasmuch as the document was framed so as to exclude the personal liability of the so-called agents.

(*q*) *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(*r*) *Scott v. Ebury* (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; *Re Northumberland Avenue Hotel*

Co. (1886), 33 Ch. D. 16; 54 L. T. 777.

(*s*) *Schmaltz v. Avery* (1851), 16 Q. B. 655; 20 L. J. Q. B. 228.

It was sought, in a recent case (*t*), to extend the principle of *Dickson v. Collen v. Wright* to support an action for damages caused by the negligence of the defendants, a telegraph company, who delivered to the plaintiffs a telegram ordering a large shipment of barley, no such message having been in fact sent to the plaintiffs. It was held that, inasmuch as the erroneous statement was not fraudulent, and there was no duty owing by the defendants to the plaintiffs in the matter, no action would lie.

“The general rule of law,” said Bramwell, L. J., “is clear, that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. . . . But then it is urged that the decision in *Collen v. Wright* has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen v. Wright*, properly understood, shows that there is an exception to that general rule. *Collen v. Wright* establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated; if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself, and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen v. Wright*. If so, it appears to me that it does not apply to the facts before us, because, in the present case, I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and *Collen v. Wright*, and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred.”

(*t*) *Dickson v. Reuter's Telegraph Co.* (1877), 3 C. P. D. 1: 47 L. J. C. P. 1.

Partnership Liability.

[20.]

WAUGH *v.* CARVER. (1794)

[2 H. BL. 235.]

In February, 1790, Erasmus Carver and William Carver, ship-agents, of Southampton, of the one part, and Archibald Giesler, ship-agent, of Plymouth, of the other part, entered into an agreement for their mutual benefit. By the terms of this agreement, Giesler was to remove from Plymouth and settle at Cowes. There he was to establish a house on his own account, which the Carvers were to puff. Giesler, on the other hand, was to endeavour to persuade all the ship-masters putting into Portsmouth to employ the Carvers. Arrangements were made for sharing in certain proportions the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them. It was also expressly provided that neither of the parties to the agreement should be answerable for the acts or losses of the other, but each for his own. Accordingly, Giesler left Plymouth and came to Cowes, and in the course of carrying on his business there he incurred a certain debt to the plaintiff in this action, who now sought to make the Carvers liable on the ground that the agreement made them partners with Giesler and responsible for his debts.

It was held, in spite of the clause providing that each should be responsible for his own losses, that the agreement did make the Carvers partners.



COX *v.* HICKMAN. (1860)

[21.]

[8 H. L. C. 268; 30 L. J. C. P. 125.]

Messrs. Smith and Co., iron-merchants, becoming insolvent, a deed of arrangement was executed between them and their creditors. By this deed, Smith and Co. assigned all their property to five trustees to carry on the business under the name of the Stanton Iron Company. The trustees were to manage the works as they thought fit, and to execute all contracts and instruments in carrying on the business. Amongst the creditors were the defendants. They subscribed and executed the deed, and were both named as trustees. One of them never acted at all; the other acted for six weeks and then resigned. The other trustees, however, did act, and did the best they could for the business. The plaintiff supplied the company with a quantity of iron ore, and one of the trustees accepted bills of exchange in the name of the company for the price of it.

The question was whether the trustees were agents for the defendants to accept the bills, and it was held that they were *not*; on the ground that the persons for whose benefit the business was carried on were not the creditors, but Messrs. Smith and Co. The real test of partnership liability, the judges said, was *not* participation in the profits, but whether the trade was carried on by persons acting as the *agents* of the persons sought to be made liable.

The Partnership Act, 1890 (53 & 54 Vict. c. 39), has codified the substantive law relating to the rights and liabilities of partners; but the case-law on the subject has not been abrogated; for sect. 46 declares that "the rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act." The previous decisions, therefore, are necessary in order fully to understand the meaning of the provisions in the Act.

Partnership Act,
1890.

Definition of partnership. Partnership is the relation which subsists between persons carrying on a business in common with a view of profit (*u*). Persons may be joint owners of property without being partners, which is illustrated in the cases of *Steward v. Blakeway* (1869), L. R. 4 Ch. 603; *Mollwo, March & Co. v. Court of Wards* (1872), L. R. 4 P. C. 419; and *Walker v. Hirsch* (1884), 27 Ch. D. 460; 51 L. T. 581; *In re Wilson, Wilson v. Holloway* (1893), 2 Ch. 340; 62 L. J. Ch. 781. A private partnership cannot be formed of more than ten persons for banking, or twenty for any other business (*x*).

Joint owners. Persons may be partners as regards the world at large, although they are not partners as between themselves; they may have all the kicks and none of the halfpence. If a man holds himself out as a partner, he is liable to a person who for that reason gives credit to the firm (*y*). The law does not prescribe any particular acts which shall constitute a "holding out"; but evidence may be given of anything the defendant has done which would naturally induce others to believe he was a partner, such acts having the effect of an estoppel. A person who lends his name to a business in this way, without having any real interest in it, is called a *nominal* partner. A *dormant* partner, on the other hand, is one who does not appear to the world to be a partner, but who shares the profits.

Holding out. It was for a long time thought that if it could be proved that the defendant *shared the profits*, he was thereby proved to be a partner. The effect of *Cox v. Hickman* is to destroy this doctrine; and the law now is that though community in the profits is *strong* evidence of partnership, it is *not conclusive*. There must always be an examination into the *intention* of the contracting parties.

Dormant partners. The Act passed in 1865, known as Bovill's Act (*z*), was repealed by the Partnership Act, 1890, but its provisions re-appear in a different form in sects. 2 and 3, which are as follows:—

Effect of sharing profits. (*u*) Sect. 1 (1). See *Green v. Beesley* (1835), 2 Bing. N. C. 108; *Steel v. Lester* (1877), 3 C. P. D. 121; 47 L. J. C. P. 43; *French v. Styling* (1857), 2 C. B. N. S. 357; 26 L. J. C. P. 181; *Lyon v. Knowles* (1863), 3 B. & S. 556; 32 L. J. Q. B. 71; *London Financial Association v. Kelk* (1884), 26 Ch. D. 107, 143; 53 L. J. Ch. 1025; *In re Whiteley, Ex parte Smith* (1892), 66 L. T. 291; 67 L. T. 69. The fifth edition of Sir Frederick Pollock's "Law of Partnership," which incorporates the new Act, and deals with the whole of its provisions in a comprehensive manner, should be consulted in order fully to appreciate the existing law on the subject.

(*x*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.

(*y*) *Dickenson v. Valpy* (1829), 10 B. & C. 128; *Fox v. Clifton* (1830), 6 Bing. 776; *Martyn v. Gray* (1863), 14 C. B. N. S. 824; *Ex parte Hayman* (1878), 8 Ch. D. 11; 47 L. J. Ch. 54; *Carter v. Whalley* (1830), 1 B. & Ad. 11; *Quarman v. Burnett* (1840), 6 M. & W. 508; Partnership Act, 1890, s. 14.

(*z*) 28 & 29 Vict. c. 86.

“2. In determining whether a partnership does or does not exist, regard shall be had to the following rules :—

Rules for determining existence of partnership.

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof ;

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived ;

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business ; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business, does not of itself make him a partner in the business or liable as such ;

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such ;

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business, or liable as such ;

(d) The advance of money by way of loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto ;

- (c) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business, is not by reason only of such receipt a partner in the business or liable as such.

Postpone-
ment of
rights of
person
lending or
selling in
considera-
tion of
share of
profits in
case of in-
solvency.

“3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower, or buyer for valuable consideration in money or money's worth, have been satisfied” (a).

As illustrating sub-sect. 3 of sect. 2, the following cases should be consulted, namely:—*Bullen v. Sharp* (1865), L. R. 1 C. P. 86; 34 L. J. C. P. 174; *Holme v. Hammond* (1872), L. R. 7 Ex. 218; 41 L. J. Ex. 157; *Ross v. Parkyn* (1875), L. R. 20 Eq. 331; 44 L. J. Ch. 610; *Pooley v. Driver* (1876), 5 Ch. D. 458; 46 L. J. Ch. 466; *Syers v. Syers* (1876), 1 App. Cas. 174; 35 L. T. 101; *Ex parte Tennant* (1877), 6 Ch. D. 303; 37 L. T. 284; *Ex parte Delhasse* (1878), 7 Ch. D. 511; 47 L. J. Ch. 65 (which decided that though an agreement is expressed to be an agreement for a loan to a partnership under sect. 1 of Bovill's Act, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the Act and the declaration, is to give him the rights and impose on him the obligations of a partner); *Pawsey v. Armstrong* (1881), 18 Ch. D. 698; 50 L. J. Ch. 683; and *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238; 57 L. J. Ch. 468; considered in the recent case of *Davis v. Davis*, [1894] 1 Ch. 393; 63 L. J. Ch. 219.

Partnership is a branch of the law of agency, and “Every partner is an agent of the firm and his other partners for the purpose of

(a) See *In re Hildesheim*, [1893] 2 Q. B. 357; 69 L. T. 550, where the rule laid down in *Ex parte Mills* (1873), 8 Ch. 569; 28 L. T. 606; *Ex parte Taylor* (1879), 12 Ch. D. 366; 41 L. T. 6; *Re Stone* (1886), 33 Ch. D. 541; 55 L. J. Ch. 795; *Ex parte Macarthur* (1871), 40

L. J. Bky. 86; 19 W. R. 821—namely, that an alteration of the terms of the original advance does not take the case out of the Act, unless the transaction amounts to a repayment of the advance and the making of a new loan, was upheld and applied.

the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner" (b). The proper test to apply to the liability of a partner who is not an actual party to a particular contract is *whether the partner who contracted did so as his agent*. On this point *Sandilands v. Marsh* (c) (where it was held that a navy agent, who does not usually deal in annuities, bound his firm by guaranteeing the payment of an annuity which he had purchased for a customer), is a leading authority. When questions of this kind arise, reference should always be made to the nature and purposes of the partnership. A member of a *mercantile firm*, for instance, would generally bind the firm by accepting a bill of exchange (d); not so, a member of a *firm of solicitors* (e). A trading firm is bound, it has been held, by one of its members releasing a debt due to it, or by the sale or insurance of the partnership goods by one of its members (f); but a partner cannot bind his colleagues by a *submission to arbitration* (g). And it has recently been held (h) that in an action on a bill of costs against two partners, the fact that one partner allows judgment to be signed against him does not create an estoppel or prevent the other partner from defending the action and recovering any over-payment by the firm to the plaintiff. Moreover, if the plaintiff was *aware of the want of authority*, even in cases where one partner might naturally

Sandilands v. Marsh.

(b) Partnership Act, 1890, s. 5. See also sects. 6, 7, 8, 10, 11, and 12, and the following cases:—*Ex parte Darlington Banking Co.* (1864), 4 D. J. & S. 581; *Baird's case* (1870), 5 Ch. 725; 39 L. J. Ch. 134; *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109; 49 L. J. Q. B. 380.

(c) (1819), 2 B. & Ald. 673; *Cleather v. Twisden* (1884), 28 Ch. D. 340; 53 L. J. Ch. 365, distinguished in *Rhodes v. Moules*, [1895] 1 Ch. 236; 64 L. J. Ch. 122, where a firm of solicitors were held liable for the fraud of a partner, on the ground that he was acting within the scope of his apparent authority. See also *Moore v. Knight*, [1891] 1 Ch. 547; 60 L. J. Ch. 271; and *Blyth v. Fladgate*, [1891] 1 Ch. 337; 60 L. J. Ch. 66.

(d) *Kirk v. Blurton* (1843), 9 M. & W. 284; 12 L. J. Ex. 117; *Forbes v. Marshall* (1855), 11 Ex. 166; 24 L. J. Ex. 305.

(e) *Hedley v. Bainbridge* (1845), 3 Q. B. 316; 2 G. & D. 483; and see *Garland v. Jacomb* (1873), L. R. 8 Ex. 216; 28 L. T. 877.

(f) *Stead v. Salt* (1825), 3 Bing. 101; *Hooper v. Lusby* (1814), 4 Camp. 66; *Brettell v. Williams* (1819), 4 Ex. 623; 19 L. J. Ex. 121; *Niemann v. Niemann* (1890), 43 Ch. D. 193; 59 L. J. Ch. 220.

(g) *Adams v. Bankart* (1835), 1 C. M. & R. 681; *Duncan v. Lowndes* (1813), 3 Camp. 478; *Farrar v. Cooper* (1890), 44 Ch. D. 323; 59 L. J. Ch. 506.

(h) *Weall v. James* (1894), 68 L. T. 54; 5 R. 157.

Liability
of share-
holders.

be expected to have authority to contract for the others, he cannot recover (*i*). A partner is liable on partnership contracts, not only to the extent of the capital he has embarked in the concern, but to the whole extent of his means, unless it is a partnership in a company with limited liability. As to the liability of persons who have become *subscribers to a company projected but not finally established*, the cases of *Reynell v. Lewis* (1846), 15 M. & W. 517; *Bailey v. Macaulay* (1849), 13 Q. B. 815; *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; and *Fox v. Clifton* (1830), 6 Bing. 776, may be consulted. Mines within the Stannaries of Devon and Cornwall are often worked by unincorporated partnerships with transferable shares on what is termed the "cost-book" principle, and the shareholders in such a company are liable on all usual contracts for goods supplied (*k*).

Incoming
partner.

"A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner" (*l*).

Retiring
partner.

"A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement" (*m*).

"A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted" (*n*).

When a person who has held himself out as a partner retires from the firm, he, of course, continues liable on contracts entered into *before* his retirement. As to contracts entered into by the firm *after* his retirement, the rule is this:—If he has advertised his retirement in the Gazette, he is not liable to *persons who did not deal with the firm when he was a member of it* (*o*). But to prevent his being liable to persons who *did* deal with the firm when he was a member of it, advertisement in the Gazette is not sufficient, the old customers, unless aware of the retirement, being entitled to express notice (*p*). If, however, a creditor who knows that a reconstruction

(*i*) *Gallway v. Mathew* (1808), 10 East, 264.

(*k*) *Hawker v. Bourne* (1842), 8 M. & W. 703; *Ralph v. Harvey* (1841), 1 Q. B. 845; and see *Harrison v. Heathorn* (1845), 6 M. & G. 81; 12 L. J. C. P. 203.

(*l*) Partnership Act, 1890, s. 17, sub-s. 1; *Beale v. Moulis* (1847), 10 Q. B. 976; *Vere v. Ashby* (1829), 10 B. & C. 288; *Cripp v.*

Tappin (1882), 1 C. & E. 13.

(*m*) Sect. 17, sub-sect. 2.

(*n*) Sect. 17, sub-sect. 3.

(*o*) See *In re Fraser, Ex parte Central Bank of London*, [1892] 2 Q. B. 633; 67 L. T. 401, following *Newsome v. Coles* (1816), 2 Camp. 617.

(*p*) *Farrar v. Deffinne* (1843), 1 C. & K. 580; Partnership Act, 1890, s. 36.

of the firm has taken place, elects to accept the new firm as his debtors, and goes on dealing with it just as before, the retiring partner is released and cannot be afterwards charged (*q*). A *dormant* partner, except as regards persons who knew him to be a partner, need not give anybody any notice of his retirement (*r*).

There are various ways in which a partnership may be dissolved:—

(1.) *By operation of law* :

E. g., through death (*s*), bankruptcy (*t*), or conviction for felony.

(2.) *By agreement* ;

E. g., if entered into for a fixed term, by the expiration of that term, or if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking (*u*).

(3.) *By a judicial decree* ;

E. g., Where the partnership was induced by fraud (*v*), or where one of the partners neglects his business (*y*), or becomes permanently insane (*z*), or is always quarrelling with the other partners (*u*), or when the business can only be carried on at a loss (*b*).

“The interests of partners in the partnership property, and their rights and duties in relation to the partnership, are determined, subject to any agreement express or implied between the partners, by the following rules (*c*):—

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(a.) In the ordinary and proper conduct of the business of the firm; or

(*q*) *Hart v. Alexander* (1838), 2 M. & W. 484; *Bilborough v. Holmes* (1876), 5 Ch. Div. 255; 35 L. T. 759; *Scarf v. Jardine* (1882), 7 App. Cas. 345; 51 L. J. Q. B. 612. But see *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32; 63 L. J. Ch. 337.

(*r*) *Carter v. Whalley* (1830), 1 B. & Ad. 11.

(*s*) *Backhouse v. Charlton* (1878), 8 Ch. D. 414; 26 W. R. 504.

(*t*) *Crawshay v. Collins* (1826), 15 Ves. 228; 1 Jac. & Walk. 278.

(*u*) Partnership Act, 1890, s. 32; *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298.

(*v*) *Rawlins v. Wickham* (1858), 1 Giff. 355; Partnership Act, 1890,

s. 41; *Mycock v. Beatson* (1879), 13 Ch. D. 384; 49 L. J. Ch. 127; *Newbigging v. Adam* (1888), 13 App. Cas. 308; 57 L. J. Ch. 1066.

(*y*) *Harrison v. Tennant* (1856), 21 Beav. 482; *Smith v. Mules* (1852), 9 Hare. 556; 21 L. J. Ch. 803; *Cheesman v. Price* (1865), 35 Beav. 142.

(*z*) *Rowlands v. Evans* (1863), 30 Beav. 302; 31 L. J. Ch. 265.

(*a*) *Watney v. Wells* (1863), 30 Beav. 56; 32 L. J. Ch. 194; *Leary v. Shout* (1865), 33 Beav. 582.

(*b*) Partnership Act, 1890, s. 35; *Jennings v. Baddeley* (1856), 3 K. & J. 78; 3 Jur. N. S. 108.

(*c*) Sect. 24.

Dissolution of partnership.
Law.

Rules as to interests and duties of partners, subject to special agreement.

- (b.) In or about anything necessarily done for the preservation of the business or property of the firm.
- (3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.
- (4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.
- (5.) Every partner may take part in the management of the partnership business.
- (6.) No partner is entitled to remuneration for acting in the partnership business (*d*).
- (7.) No person may be introduced as a partner without the consent of all existing partners.
- (8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners (*e*).
- (9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them."

Expulsion of partner. "No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners" (*f*).

Retirement from partnership at will. "Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners" (*g*).

Where partnership for term is continued over, continuance on old terms presumed. "When a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will" (*h*).

(*d*) *Airey v. Borham* (1861), 29 Beav. 620.

(*e*) *Clements v. Norris* (1878), 8 Ch. D. 129; 47 L. J. Ch. 546.

(*f*) Sect. 25. See, however, *Russell v. Russell* (1880), 14 Ch. D. 471; 49 L. J. Ch. 268.

(*g*) Sect. 26.

(*h*) Sect. 27 (1). And see *Yates v. Finn* (1880), 13 Ch. D. 839; 49 L. J. Ch. 188; *Cox v. Willoughby* (1880), 13 Ch. D. 863; 49 L. J. Ch. 237; *Neilson v. Mossend Iron Co.* (1886), 11 App. Cas. 298; and *Daw v. Herring*, [1892] 1 Ch. 284; 61 L. J. Ch. 5.

“Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connexion” (*i*). And “if a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.”

Account-ability of partners for private profits.
Duty of partner not to compete with firm.

“In settling accounts between parties after a dissolution of partnership, the following rules prevail, subject to any agreement to the contrary:—

- (a.) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.
- (b.) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:—
 1. In paying the debts and liabilities of the firm to persons who are not partners therein:
 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
 3. In paying to each partner rateably what is due from the firm to him in respect of capital:
 4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible” (*k*).

(*i*) Sect. 29 (1); *Aas v. Benham*, [1891] 2 Ch. 244; 65 L. T. 25. *Binney v. Mutrie* (1886), 12 App. Cas. 160; 36 W. R. 129, P. C.
 (*k*) *Potter v. Jackson* (1880), 13 Ch. D. 845; 49 L. J. Ch. 232; Sect. 44 of the Partnership Act, 1890.

Mortgagor's Tenants.

[22.]

KEECH *v.* HALL. (1778)

[1 Doug. 21.]

The owner of a warehouse in the city mortgaged it to Mr. Keech, but remained in possession. Soon afterwards, without saying a word to Keech on the subject, he leased it for seven years to Hall. Keech was very indignant at this. He said the mortgagor had exceeded his rights, having no business to do such a thing without consulting him, and that Hall was *no better than a trespasser, and could be ejected without notice*. And the judges coincided with his view of the matter.



[23.]

MOSS *v.* GALLIMORE. (1780)

[1 Doug. 279.]

Mr. Harrison began the year 1772 by letting a house to Moss for twenty years at the rent of 40*l.* a year; and in May of the same year he mortgaged the property to a Mrs. Gallimore. Moss was not in the least affected by this mortgage of the reversion. He went on quietly living in the house, and paid Harrison his rent pretty regularly up to November, 1778, when he was 28*l.* behindhand. At that time Harrison became bankrupt, being at the time indebted to Mrs. Gallimore for interest on the mortgage in a sum greater than 28*l.* Mrs. Gallimore gave Moss notice of her being mortgagee, and told him to pay to her the 28*l.* which he unquestionably owed to somebody. Moss showed no disposition to yield to this demand, and finally the old lady made a raid upon his

chairs and tables. This distraint Moss considered a trespass, and brought an action accordingly. It was held, however, that Mrs. Gallimore was quite justified in distraining, for a mortgagee after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage is entitled to the rent in arrear at the time of the notice as well as to what accrues afterwards, and he may distrain for it after such notice.

The former of these two cases has to do with leases made by the mortgagor *after* the mortgage, the latter with leases made by the mortgagor *before* the mortgage.

Difference between two leading cases.

There is, no doubt, considerable misapprehension among laymen as to the true position of a mortgagor in respect of his power of dealing with the mortgaged premises, especially in regard to the granting of leases and the creation of tenancies. His position, of course, varies according to the particular circumstances. In the case of a simple mortgage without any further agreement or condition, the mortgagor becomes a tenant at sufferance of the mortgagee (*l*) immediately upon the execution of the deed; but should he remain in possession of the premises, with the consent of the mortgagee, he is then held to be in the position of a tenant at will. Though such consent need not be express, it may, however, be taken that it cannot be implied from the mere fact that the mortgagee did not oust the mortgagor from the premises directly the mortgage deed was executed. So long as the mortgagor remains no more than a tenant at sufferance he is, of course, not entitled to any notice to quit.

What is the true position of mortgagor?

It very frequently happens that the mortgage deed contains an express covenant that the mortgagor shall remain in possession until default in payment of the mortgage money *at a time certain*, and, therefore, this covenant operating as a re-demise, until that time arrives the possession of his estate is secured to him: he becomes, in fact, a termor (*m*). But, if he fail to redeem his pledge by the appointed day, he then becomes a tenant at sufferance to the mortgagee. "The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same" (*n*). It must, however, be carefully noted that (in spite of a somewhat conflicting

Express covenant in mortgage deed.

(*l*) *Thunder d. Weaver v. Belcher* Bing. N. C. 508; 4 Scott, 301. (1803), 3 East, 449.

(*n*) Per Best, C. J., 5 Bing. p.

(*m*) *Wilkinson v. Hall* (1837), 3 427.

decision (*o*) of doubtful authority), except where there is an express and positive covenant that the mortgagor shall hold for a *determinate* period, there is no re-demise, and the mortgagor is but a tenant at sufferance from the time of the execution of the mortgage. Thus, where it was provided that, if the mortgagor should pay the principal and interest on the 25th March then next, the mortgagee should re-convey, and there was also a covenant that *after default* the mortgagee might enter, it was held that the estate was in the mortgagee from the time of the execution of the mortgage (*p*).

There are, moreover, other special forms of agreement (*q*) giving rise to the existence of various relations between the parties, and which cannot now be discussed; but, whenever the mortgagor occupies the premises as tenant at sufferance or tenant at will to the mortgagee, it is clear that he can have no power of letting in sub-tenants, and, if any such are so let in by him, they may undoubtedly be treated by the mortgagee as tort-feasors. But this remark must be taken as subject to the provisions of the Conveyancing Act, 1881, to which allusion will presently be made. And it was recently held that, where a mortgagor remaining in possession let the premises to a tenant who brought in trade fixtures, the tenant was entitled to remove the fixtures as against the mortgagee as well as against the mortgagor. See *Sanders v. Davis* (1885), 15 Q. B. D. 218; 54 L. J. Q. B. 576; and *Gough v. Wood*, [1894] 1 Q. B. 713; 63 L. J. Q. B. 564.

Recogni-
tion of
tenancy by
mortgagee.

Supposing, however, the mortgagee in any way recognizes their tenancy (*r*), they become his tenants at the rent they agreed with the mortgagor to pay; and whether such recognition has indeed taken place is a question of fact for the consideration of a jury, but it would seem to be the better opinion that they would not be warranted in inferring it from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage (*s*).

Notice by
mortgagee
not
enough.

It was once thought that a mortgagee had only to give him notice to make one of these persons his own tenant. But it is now clear that there must be some evidence of the man's consent; and that the tenancy which from the time of that consent begins, is a

(*o*) *Doe d. Lyster v. Goldwin* (1841), 2 Q. B. 143; 1 G. & D. 463.

(*p*) *Doe d. Roylance v. Lightfoot* (1841), 8 M. & W. 553; 5 Jur. 966.

(*q*) *Jolly v. Arbuthnot* (1859), 4

De G. & J. 224; 28 L. J. Ch. 547.

(*r*) *Doe d. Whitaker v. Hales* (1831), 7 Bing. 322; 5 M. & P. 132.

(*s*) *Doe d. Rogers v. Cadwallader* (1831), 2 B. & Ad. 473; *Evans v. Elliot* (1838), 9 A. & E. 342.

new tenancy and not merely a continuation of the old one between himself and the mortgagor (*t*).

As to the tenant of a mortgagor under a lease made *before* the mortgage, it may be remarked that, on the execution of the mortgage, he becomes tenant of the mortgagee, to whom the estate has been conveyed; and, therefore, the mortgagor could not maintain ejectment for a forfeiture. For, although it is a rule of law that a tenant cannot dispute the title of his landlord, yet he may confess and avoid it by showing that it is determined (*u*). It was formerly necessary that the tenant of the mortgagor should *attorn* to the mortgagee before the latter could claim rent from him, but it is now sufficient that the mortgagee should give the tenant *notice* to pay the rent to him (*x*).

It often happens that the relation of landlord and tenant is created between the mortgagee and the mortgagor by means of the insertion of an attornment clause in the mortgage deed. The object of this is, of course, to give the mortgagee the benefit of the power of distress possessed by a landlord, and it is a perfectly legitimate device where the arrangement is *bond fide* and not a mere contrivance for giving a preference to the mortgagee in case of the bankruptcy or insolvency of the mortgagor (*y*). In such a case the mortgagee is entitled to distrain the goods even of a stranger (*z*).

A considerable modification of the law connected with the subject-matter of this note has been effected by the Conveyancing and Law of Property Act, 1881. It applies to mortgages made after the Act and where no contrary intention is expressed in the mortgage deed. Subject to the provisions of the Act, the mortgagor while in possession may, if he reserve the best available rent, grant certain leases to take effect in possession not later than twelve months after date. For further information, reference should be made to the statute itself (*a*).

Attorn-
ment
clause in
mortgage.

Act of
1881.

(*t*) *Brown v. Storey* (1840), 1 Scott, N. C. 9; 1 M. & G. 117; *Waddilove v. Barnett* (1836), 2 Bing. N. C. 538; 2 Scott, 763; *Corbett v. Plowden* (1884), 25 Ch. D. 678; 51 L. J. Ch. 109; and *Towerson v. Jackson*, [1891] 2 Q. B. 484; 61 L. J. Q. B. 36, where it was held that the mere fact of the tenant remaining in possession after notice by the mortgagees to pay the rent to them does not establish an agreement to become their tenant.

(*u*) *Doe d. Marriott v. Edwards* (1834), 5 B. & Ad. 1065; 6 C. & P. 208.

(*x*) *Rawson v. Eicke* (1837), 7 A. & E. 451; 2 N. & P. 423; *Cook v. Guerra* (1872), 41 L. J. C. P. 89; L. R. 7 C. P. 132; *Underhay v. Read* (1888), 20 Q. B. D. 203; 57 L. J. Q. B. 129.

(*y*) *Ex parte Voisey, In re Knight* (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; *In re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335; 48 L. J. Ch. 417.

(*z*) *Kearsley v. Philips* (1883), 11 Q. B. D. 621; 52 L. J. Q. B. 581.

(*a*) 11 & 15 Viet. c. 41, s. 18. See the recent cases of *Municipal Building Society v. Smith* (1889), 22 Q. B. D. 70; 58 L. J. Q. B.

Judicature Act, 1873. The Judicature Act, 1873 (*b*), gives power to “a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall be given by the mortgagee,” to sue for such possession, to recover rent due to him, or to bring an action of trespass in his own name “unless the cause of action arises upon a lease or other contract made by him jointly with another person.” It has been held that a mortgagor in receipt of rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property, and that without joining the mortgagee as a party (*c*).

Joint Tenancy.

[24.]

MORLEY *v.* BIRD. (1798)

[2 VES. 629.]

William Collins by his will gave all his property to his daughter Elizabeth, on condition that she paid to the four daughters of his brother John “*four hundred pounds out of seven now lying in the £3 per cent. consolidated.*”

Three of John’s daughters having died during the testator’s lifetime, it was held that Martha, the fourth daughter, who survived him, was entitled to the whole legacy given to the four daughters.

“Great doubts,” said Sir R. P. Arden, M. R., “have been entertained by judges, both at law and in equity, as to words creating a joint tenancy or a tenancy in common; and it is clear the ancient law was in favour of a joint tenancy. And that law still prevails: unless there are some words to sever the interest taken, it is at this moment

61; and *Wilson v. Queen’s Club*,
[1891] 3 Ch. 522; 60 L. J. Ch.
698.

(*b*) S. 25, sub-s. 5.
(*c*) *Fairelough v. Marshall* (1878),
4 Ex. D. 37; 48 L. J. Ex. 146.

a joint tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common. . . . This is a legacy to four persons, and there are no words of severance; therefore it is a joint legacy, and the whole interest survives to the survivor, three being dead."

An estate in joint tenancy is one acquired by two or more persons in the *same land*, by the *same title* (not being a title by descent), at the *same period*, and *without words importing that they are to take in distinct shares*. Joint tenants are not considered as holding in distinct shares, like tenants in common, but *each is equally entitled to the whole*; and it is from this entirety of interest that the most remarkable incident of joint tenancy, the right of survivorship, arises.

Characteristics of joint tenancy.

Right of survivorship.

But, although there may be no words of severance, special circumstances may sometimes justify the Courts in construing what seems to be a joint tenancy to be really a tenancy in common; *e.g.*, the purchase-money being advanced in unequal proportions (*d*), or the purchase being made for a joint undertaking (*e*), or, again, in the case of marriage articles (*f*).

Tenancy in common, though no words of severance.

So far as the law of contracts is concerned, the most important aspect in which joint tenants and tenants in common can be regarded is as landlords, and on that branch of the subject the following remarks from a work of great authority in the profession may be quoted:—

Leases by joint tenants and tenants in common.

"Joint tenants and tenants in common may, according to the interest they have, join or sever in making leases; and such leases bind, whether made to commence *in presenti* or *in futuro*. If joint tenants join in a lease, there is but one lease, and they all make but one lessor, for they have but one freehold; but if tenants in common join in a lease, there are several leases of their several interests; for although tenants in common cannot make a joint lease of the whole of their estate, yet if they join in a lease for years by indenture of their several lands, it is the lease of each for their respective parts and the cross-confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively. There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions (*g*).

(*d*) *Lake v. Craddock* (1732), 1 Lead. Cas. Eq. 205; 3 P. Wms. 158.

(*f*) *Liddard v. Liddard* (1860), 28 Beav. 266.

(*e*) *Jeffereys v. Small* (1683), 1 Vern. 217.

(*g*) *Thompson v. Hakewill* (1865), 19 C. B. N. S. 713; 35 L. J. C. P. 18.

Where joint tenants concur in granting a lease, the interest of the lease continues, notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent (*h*). So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy even for a moiety; all survives to the other, and if the lessee continue his possession, the survivor may maintain an action for the whole rent. But though each joint tenant is considered entitled to the whole while the joint tenancy continues, and is said to be seised ‘per my et per tout,’ yet, for the purposes of alienation, each has an exclusive right to, and dominion over, his own share or proportion; and therefore if one of two joint tenants make a lease of the whole, his moiety only will pass (*i*). So, a lease purporting to be made by both, and executed by one only, is a good lease for the moiety of him only who has executed.

“If one joint tenant make a lease of his moiety for years, and die before the lessee’s entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expire. And so one joint tenant may make a lease to commence after his death, and his co-tenant, if he survive, will be bound by it (*k*). ”

“One joint tenant or tenant in common may make a lease for years of his part to his companion” (*l*).

A joint tenancy may be dissolved by *partition*; by *alienation without partition*; or by *accession of interest*. A joint tenant, however, *cannot leave his share by will*, because a will is of no force till the testator is dead, and then the right of survivorship, which accrued at the original creation of the estate, has a prior claim to be considered (*m*). If one of three joint tenants exercises his power of disposition in favour of a stranger, that person will then hold one undivided third part of the land as tenant in common with the remaining two (*n*).

(*h*) Doe *v.* Summersett (1830), 1 B. & Ad. 135.

(*i*) Bellingham *v.* Alsop (1605), Cro. Jac. 52.

(*k*) Clerk *v.* Clerk (1694), 2 Vern. 323.

(*l*) Cowper *v.* Fletcher (1865), 6 B. & S. 464; 13 W. R. 739; Woodfall, Landl. & Ten., 15th ed. p. 13.

(*m*) Swift *v.* Roberts (1764), 3 Burr. 1488.

(*n*) Wms. R. P., 17th ed. p. 134.

Form of Contracts.

STATUTE OF FRAUDS.

Leases for more than Three Years not in Writing.

RIGGE *v.* BELL. (1793)

[25.]

[5 T. R. 471.]

By parol merely, Rigge let Hague's Farm in Yorkshire to Bell for seven years, and Bell entered and paid rent. But the tenant did not give satisfaction, and Rigge determined to get rid of him. By the terms of the agreement Bell was to go out at Candlemas; but Rigge's view was, as the lease, being for more than three years, and yet not in writing, as the Statute of Frauds required, operated merely as a tenancy at will, he could make the man quit when he pleased, and was not bound by the terms they had agreed on. In this view he found himself mistaken, for it was held that, "though the agreement be void by the Statute of Frauds as to the *duration* of the lease, it *must regulate the terms on which the tenancy subsists in other respects*, as to the rent, the time of the year when the tenant is to quit, &c."

[26.]

CLAYTON *v.* BLAKEY. (1798)

[8 T. R. 3.]

By parol merely, Mr. Clayton let Blakey some land for twenty-one years, and Blakey entered and paid rent. Two or three years afterwards his landlord gave him notice to quit, and, as he treated such notice with contempt, sued him for double rent for holding over. To this claim Blakey raised the defence that (by virtue of sect. 1 of the Statute of Frauds, which directs that any lease for more than three years not reduced into writing shall operate only as a tenancy at will) he was only a tenant at will, and ought to have been so described in the plaintiff's declaration. It was held, however, that Blakey was *not a tenant at will, but a yearly tenant*, and therefore the plaintiff's pleading was good enough to hit him.

Explan-
ation of
Clayton *v.*
Blakey.

The decision in Clayton *v.* Blakey seems at first sight rather extraordinary. The Statute of Frauds (sects. 1 and 2) distinctly says that all leases by parol for more than three years shall be *tenancies at will* only. The decision intervenes and says, "No; they shall be *yearly tenancies*," thus putting the tenant in a better position than the statute left him in. The accepted explanation is that the statute's intention merely was that the estate should be an estate at will *to begin with*, but that, when once created, it should be liable, like any other estate at will, to be changed into a tenancy from year to year by payment of rent or anything showing an intention to create a yearly tenancy; if, however, there were no circumstances showing such an intention, the estate would remain an estate at will.

Walsh *v.*
Lonsdale.

A tenant holding under an agreement for a lease of which specific performance would be decreed, now (since the Judicature Act) stands in the same position as to liability as if the lease had been executed, and is not merely a tenant from year to year by the payment of rent (*a*).

Tenancy
at will,
how
created.

A tenancy at will is an estate in land determinable at the will either of landlord or tenant. It may arise either by implication or

(*a*) Walsh *v.* Lonsdale (1882), 21 Ch. D. 9; 52 L. J. Ch. 2.

by express words. In *Richardson v. Langridge* (b) it was held that if an agreement be made to let premises *so long as both parties like, and reserving a compensation accruing de die in diem, and not referable to a year or any aliquot part of a year*, a tenancy at will is thereby created. Tenancy at will must be carefully distinguished from tenancy *by sufferance*, which is when a person, who has originally come into possession by a lawful title, holds possession after his title has determined. Tenancy by sufferance.

Where, on the expiration of a lease for a year, the tenant remains in possession with the consent of the landlord, and nothing is said or done inconsistent with his holding on under the terms of the lease, the implication of law is, that a tenancy from year to year has been created on the same terms in so far as they are not inconsistent with a tenancy from year to year (c).

A few words may be said as to the *notice to quit* necessary in the case of yearly tenants. Such a tenancy may at common law be determined by *half a year's notice* expiring at that period of the year at which the tenancy commenced. Where, however, the tenancy is within the Agricultural Holdings Act, 1883 (d), a year's notice is generally necessary. The 33rd section of that Act provides that :— Notice to quit.
Half year's notice necessary.
Whole year's notice necessary under Agricultural Holdings Act, 1883.

“Where a half-year's notice, expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.”

The construction placed upon this section is that it is limited to cases where a half-year's notice is *by law* necessary to determine the tenancy, and has no application to cases of *agreement* (e). A notice to quit given by one of several joint tenants on behalf of all, whether with the authority of the others or not, will put an end to the tenancy (f). So will notice by one of several executors or Joint tenants.
Executors.

(b) (1811), 4 Taunt. 128.

(c) See *Dougal v. McCarthy*, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462; applying the doctrine laid down by Lord Mansfield and Buller, J., in *Right v. Darby* (1786), 1 T. R. 159.

(d) 46 & 47 Vict. c. 61.

(e) *Barlow v. Teal* (1885), 15 Q. B. D. 501; 54 L. J. Q. B. 564; and see *Wilkinson v. Calvert* (1878), 3 C. P. D. 360; 47 L. J. C. P. 679.

(f) *Doe d. Aslin v. Summersett* (1830), 1 B. & Ad. 135.

administrators on behalf of all, unless a joint notice is required in the lease (*g*). But notice by a mere receiver of rents is bad (*h*).

Verbal notice good. Construction of notices. Alternative notice.

The notice may be a verbal one, though it had much better be in writing. The Courts are inclined to construe notices to quit liberally, so that trifling inaccuracies will be overlooked (*i*). The great point is that the tenant *should not be able to mistake the object of the notice*. But a notice in the alternative, *e.g.*, requiring the tenant *either to quit or to pay an increased rent*, will not do. If, however, after telling him to quit, the landlord adds "*or I shall insist on double rent*," the notice is good (*k*). One must be a lawyer, perhaps, to appreciate this distinction.

Service of notice.

The notice need not be served personally. It may be left with and explained to a servant at the tenant's residence (*l*). It may be put under a door (if it comes into the tenant's hands within the proper time) (*m*), or sent through the post (*n*). Service on one joint tenant furnishes presumptive evidence that the notice reached the other (*o*). Where the premises have been underlet, the notice must be given to the lessee, not to the sub-lessee (*p*).

Monthly and weekly tenancies.

In the case of tenancies for less than a year, the length of the notice depends on the letting. A month's notice is necessary to determine a monthly tenancy (*q*), and a week's notice is necessary to determine a weekly tenancy (*r*).

Effect of acceptance of rent due subsequent to notice to determine tenancy of chattels.

In the recent case of *Keith, Prowse & Co. v. National Telephone Co.* (*s*), it was held that the demand and acceptance of rent *due subsequent* to a notice to determine a tenancy of chattels is a waiver of the notice; and, *semble*, that when a term in chattels has expired and rent has been subsequently accepted, a tenancy from year to year is created, and the tenant is entitled to six months' notice to

(*g*) *Right d. Fisher v. Cuthell* (1804), 5 East, 491.

(*h*) *Doe d. Mann v. Walters* (1830), 10 B. & C. 626; 5 M. & R. 357.

(*i*) *Doe d. Armstrong v. Wilkinson* (1840), 12 Ad. & E. 743; *Doe v. Kightley* (1796), 7 T. R. 63; 1 Ch. 11.

(*k*) *Doe d. Matthews v. Jackson* (1779), 1 Dougl. 175; *Doe d. Lyster v. Goldwin* (1841), 2 Q. B. 143; 1 G. & D. 463.

(*l*) *Jones v. Marsh* (1791), 4 T. R. 464; and see *Tanham v. Nicholson* (1872), L. R. 5 H. L. 561; 6 Ir. R. C. L. 188.

(*m*) *Alford v. Vickery* (1842), Car. & Marsh. 280.

(*n*) *Papillon v. Brunton* (1860), 5 H. & N. 518.

(*o*) *Doe v. Watkins* (1806), 7 East, 551.

(*p*) *Pleasant d. Hayton v. Benson* (1811), 14 East, 234.

(*q*) *Doe d. Parry v. Hazell* (1794), 1 Esp. 94.

(*r*) *Bowen v. Anderson*, [1894] 1 Q. B. 164; 42 W. R. 236; explaining *Sandford v. Clarke* (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; and following *Jones v. Mills* (1861), 10 C. B. N. S. 788; 31 L. J. C. P. 56. And see *Harvey v. Copeland* (1892), 30 L. R. Ir. 412, and *Huffell v. Armitstead* (1835), 7 C. & P. 56.

(*s*) [1894] 2 Ch. 147; 63 L. J. Ch. 373.

determine the tenancy, whatever may have been the length of notice required during the continuance of the original tenancy (*t*).

By 4 Geo. 2, c. 28, s. 1, "if a tenant for life or years contumaciously disregards his landlord's written requirement to give up the premises, and wrongfully holds over, he will be liable to pay compensation at the rate of *double the yearly value*." The statute, however, does not apply to weekly tenancies (*u*), nor (probably) to a tenancy from quarter to quarter (*x*). In the calculation of the double value, only the land and its appurtenances can be included; therefore not the value of the power of an engine let with a mill (*y*).

By 11 Geo. 2, c. 19, s. 18, if a tenant who has given notice himself holds over, he will become liable to pay *double the yearly rent*. This statute applies only to those cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given such a notice (*z*). But it applies to all kinds of tenancies (*a*).

Holding over by tenant told to go.

Holding over by tenant who has himself given notice of going.

Debt, Default, or Miscarriage.

BIRKMYR *v.* DARNELL. (1704)

[27.]

[6 MOD. 248 ; 2 LD. RAYM. 1085.]

"My friend, Mr. Lightfinger, wants a horse; will you lend him yours?" said Darnell meeting Birkmyr one day in 1700. "Well, I don't mind," replied Birkmyr, "if you'll be responsible for his letting me have it safely back again." "Certainly I will," replied Darnell emphatically.

On the faith of this collateral undertaking, Birkmyr lent Lightfinger the horse. It was not returned, so he sued Darnell as surety. This, however, did him no good,

(*t*) *Sed quare*, whether this doctrine is not, at least, stated in too general terms.

(*u*) Lloyd *v.* Rosbee (1810), 2 Camp. 453.

(*x*) Sullivan *v.* Bishop (1826), 2 C. & P. 259.

(*y*) Robinson *v.* Learoyd (1840), 7 M. & W. 48.

(*z*) Johnstone *v.* Huddleston (1825), 4 B. & C. 922 ; 7 D. & R. 411.

(*a*) Timmins *v.* Rawlinson (1765), 3 Burr. 1603 ; 1 W. Bl. 533.

because he found that he ought to have taken Darnell's promise in writing in accordance with the 4th section of the Statute of Frauds, 29 Car. 2, c. 3.

[28.] MOUNTSTEPHEN *v.* LAKEMAN. (1874)

[L. R. 5 Q. B. 613; 7 H. L. 17.]

A builder was employed by the Brixham Board of Health to make a main sewer for them. He got his work finished, and the Board, in the usual peremptory manner of local authorities, gave notice to the neighbouring householders that they must connect the drains of their houses with the main sewer, or the Board would do it for them at their expense.

The householders displayed the slackness common on such occasions; and Mr. Lakeman, the chairman of the Board, happening to meet the builder in the street a few days afterwards, the following conversation took place:—"Well, Mountstephen," said Lakeman, "you've done the main sewer very nicely for us; would you have any objection to making the connections too?" "Certainly not, Sir; if you or the Board will order the work or become responsible for the payment." "*Well, then,*" said Lakeman, "*go and do it; I will see you are paid.*"

Mountstephen, therefore, made the connections, the Board's surveyor superintending the progress of the work, and by-and-by he sent in his account to the Board, debiting them with the account. The Board, however, refused to pay, saying they had not authorized the work. Mountstephen, therefore, brought an action against Lakeman, and it was held that *Lakeman's words were evidence to sustain*

a claim against him personally, and that they did not constitute a promise to pay the debt of another.

The test as to whether or not any undertaking for another should have been in writing is this:—*Does that other, after the undertaking has been made for him, remain primarily liable?* If (like the man who went off with the horse) he does, the undertaking cannot be sued on unless it is in writing; if (like the Brixham Board) he does not, it is binding, though not in writing. If I go with you to a tailor's, and say to the tailor "Make this gentleman a pair of trousers, and *if he doesn't pay you, I will*;" in this case you clearly remain primarily liable, and I cannot be successfully sued as your surety, because my promise is not in writing. But supposing, when we go into the shop, I say, "Make this gentleman a pair of trousers, and *put them down to me*," here you are not primarily liable, and therefore the 4th section of the Statute of Frauds does not require my promise to be in writing.

Who is primarily liable?

So, too, if the effect of the undertaking is *to extinguish another person's debt*, so that, though up to that time he has been liable, he remains so no longer, the undertaking is binding, though not in writing. If, for instance, under the old debtor laws, when the effect of a creditor's liberating a debtor, whom he had taken in execution, was to release the debt, Weakman promised to pay the amount of Hardup's debt to Holdfast, if Holdfast would release him from arrest; this promise was not within the statute, because the debt was gone by the discharge of the debtor out of custody, and Weakman remained solely liable (*b*).

Extinction of debt.

So, too, if goods are furnished to a married woman under a contract not binding on her separate estate or (not being necessities) to an infant at the defendant's request, the defendant's undertaking to pay for them is not collateral, because the married woman or infant is not primarily liable (*c*).

When the undertaking has been by word of mouth, it is for the jury to say whether or not the person for whose benefit the promise has been made is primarily liable: and this is a question of fact which, depending as it does on all the circumstances of the case, it is sometimes extremely difficult to decide. On this point a case that may usefully be compared with *Mountstephen v. Lakeman* is *Keate v. Temple*, where a Portsmouth tailor tried unsuccessfully to make a lieutenant in the navy pay for a quantity of coats supplied to his crew, the defendant having said, "I will see you paid at the

Keate v. Temple.

(*b*) *Goodman v. Chase* (1818), 1 B. & Ald. 297; and see *Bird v.* 883; 5 Scott, 213.

Gammon (1837), 3 Bing. N. C. (c) *Harris v. Huntback* (1757), 1 Burr. 373.

pay-table" (*d*). Eyre, C.J., in delivering the judgment of the Court, said, "There is one consideration, independent of everything else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is £576 7s. 8d., and this against a lieutenant in the navy: a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or of the plaintiff to furnish the goods on his credit to so large an amount. . . . From the nature of the case it is apparent that the men were to pay in the first instance. . . . The question is, whether the plaintiff did not in fact rely on the power of the officer over the fund, out of which the men's wages were to be paid, and did not prefer *giving credit to that fund rather than to the lieutenant*, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum."

Distinction
between
guarantee
and indemnity.

Sutton v.
Grey.

The question whether an undertaking to be liable for another amounts to a *guarantee*, within the meaning of sect. 4 of the Statute of Frauds, or is simply an *indemnity*, is often very difficult to determine. The distinction has very recently been dealt with by the Court of Appeal in two cases which will probably in future be considered as the leading cases on the subject. In *Sutton v. Grey* (*e*) the plaintiffs, a firm of stockbrokers, by a verbal agreement with the defendant, undertook to transact business and be answerable upon the Stock Exchange for customers whom the defendant should introduce, upon the terms that the defendant should receive half of the commission earned upon, and be liable to the plaintiffs for half the losses arising from such transactions. Owing to the default of a customer a loss was incurred by the plaintiffs, the half of which they sought to recover under this agreement; and it was held that the promise to be answerable for the losses was the ulterior consequence only to the agreement, the main object of which was to regulate the terms of the defendant's employment in respect of transactions in which he was interested; that, therefore, the contract was one of indemnity and not a promise to guarantee the debt of another person, and that sect. 4 of the Statute of Frauds did not apply. Lord Esher, M.R., in his judgment referred with approval to the test laid down by Parke, B., in *Couturier v. Hastie* (*f*) (where it was held that the undertaking of a *del credere* agent, who vouches for the purchaser's solvency, is *not* within the statute; for though the undertaking may result in a liability to

Del credere
agent.

(*d*) (1797), 1 Bos. & P. 158.

(*e*) [1894] 1 Q. B. 285; 63 L. J. Q. B. 633.

(*f*) [1852] 8 Ex. 40; 22 L. J.

Ex. 97. See, also, per Cockburn, C. J., in *Fitzgerald v. Dressler* (1859), 7 C. B. N. S. 374; 29 L. J. C. P. 113.

pay the debt of another, that is not the immediate object for which the consideration is given), which was stated to be *whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise.*

In *Guild v. Conrad* (*g*) the defendant orally promised the plaintiff that, if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills. It was held that as this was a promise to be liable primarily or in any event for a debt for which another person was already or was to become liable, irrespective of the question whether or not that person failed to satisfy that liability, it was an indemnity and not a guarantee, and consequently need not be in writing. *Guild v. Conrad.*

The undertaking, to be within the statute, must be given to the creditor. The leading case on this subject is *Eastwood v. Kenyon* (*h*), where the defendant promised the plaintiff to see to the settlement of a debt which the latter owed to a third person. The promise was held to be binding, though not in writing. So, in another case, a man promised a bailiff that, if he would not arrest a relative of the former's for non-payment of a judgment debt, he would pay the money himself. This promise, also, was held not to require writing, because not made to the original creditor (*i*). Promise to debtor not within statute.

Again, in the recent case of *In re Hoyle* (*k*), a partner in a firm agreed to indemnify the firm against certain debts owing by a named person to the firm; and this contract was held not to be a promise to answer for the debt of another person within the 4th section of the Statute of Frauds. "I think," said Bowen, L.J., "that to bring a promise within the statute, the debt for which the defendant has promised to answer must be a debt due to the person to whom the promise is made, and that the promise must be made to a person who could bring an action for the debt."

Before a guaranty can become binding on the guarantor it *must* be accepted by the person to whom it is offered. A man once wrote to some publishers at Derby the following letter:— Guaranty must be accepted.

"Gentlemen,

"Doncaster, July 5th, 1833.

"Mr. France informs me that you are about publishing

(*g*) [1894] 2 Q. B. 885; 63 L. J. Q. B. 721.

(*h*) (1840), 11 Ad. & E. 438; 3 P. & D. 276.

(*i*) *Reader v. Kingham* (1862), 13 C. B. N. S. 341; 32 L. J. C. P. 108; and see *Thomas v. Cook* (1828), 8 B. & C. 728; 3 M. & R.

444; followed and approved in *Guild v. Conrad*, *supra*; but see also the doubtful decisions of *Green v. Cresswell* (1839), 10 Ad. & E. 453; and *Cripps v. Hartnoll* (1862), 2 B. & S. 679; 31 L. J. Q. B. 150.

(*k*) [1893] 1 Ch. 84; 62 L. J. Ch. 182.

an arithmetic for him and another person, and I have no objection to being answerable as far as £50. For my reference, apply to Messrs. Brooke & Co., of this place.

"I am, Gentlemen, your most obedient servant,

"Geo. Tinkler.

"Witness to Mr. Tinkler,

"J. Brooke.

"To Messrs. Mozley & Son, Derby."

Mozley & Son vouchsafed no reply to this letter, but proceeded to publish the arithmetic. It was held in an action which they afterwards brought against Tinkler, that they could not treat his letter as a guaranty because they *had never accepted it (l)*.

Torts.

It is to be observed that the words of the statute ("debt, default, or miscarriage") *do not refer exclusively to contracts*. Accordingly, if my friend Jones wrongfully takes Brown's horse and injures it, and I then promise Brown to pay the damage if he will not take proceedings against Jones, I am not bound unless I promise in writing (*m*).

As to the release of a surety, and contribution between co-sureties, see *post*, pp. 307, 312.

The Memorandum or Note in Writing.

[29.]

WAIN v. WARLTERS. (1804)

[5 EAST, 10; 1 SMITH, 299.]

Mr. Warlters was decidedly a fortunate litigant. He had a friend named Hall, who became indebted to Messrs. Wain & Co. to the extent of £56, and with no particular means of payment. To extricate this friend from his

(l) *Mozley v. Tinkler* (1835), 1 C. M. & R. 692; 5 Tyr. 416; and see *M'Iver v. Richardson* (1813), 1

M. & S. 557.

(m) *Kirkham v. Marter* (1819), 2 B. & Ald. 613; 1 Chit. 382.

difficulties Warlters sat down and wrote out the following collateral security:—

“*Messrs. Wain & Co.,*

“*I will engage to pay you by half-past four this day £56 and expenses on bill that amount on Hall.*

“*(Signed) Jonathan Warlters.*

“*No. 2 Cornhill, April 30th, 1803.*”

Hall, of course, did not pay the money. So Wain & Co. sued Warlters on his guaranty. But the document was held to be mere waste paper, *as no consideration for Warlters' promise to pay the £56 was expressed in it.*

The Statute of Frauds requires that “the agreement” shall be in writing; and obviously *the consideration* is as much a part of the agreement as *the promise*. But though *Wain v. Warlters* is therefore a perfectly correct interpretation of the statute, the law on the subject (so far as regards guaranties) has been changed by the Mercantile Law Amendment Act of 1857 (*n*). Guarantors were always wriggling out of their engagements (as Warlters did) by technical defences, and, to put a stop to such dishonesty, it was enacted that, *provided a consideration did in fact exist, it need not be put into the document*, but might be proved by oral evidence. The promise, however, must still be in writing just as much as before (*o*).

Consideration need not appear.

Wain v. Warlters is generally considered the leading case on the “memorandum or note in writing” spoken of in the Statute of Frauds. It is necessary that this memorandum should have been made *before the commencement of the action* (*p*). It need not be very precise in its terms, the principle being that it is *just such a memorandum as merchants in the hurry of business might be supposed to make*. It is necessary, however, that *the names* of both parties, or, at all events, a clear *description* of them should appear (*q*). If the vendor is described in the contract as “proprietor,” “owner,” “mortgagee,” or the like, the description is sufficient, although he is not named; but if he is described as “vendor,” or as “client,”

Memorandum or note in writing. Before action.

Names or description.

(*n*) 19 & 20 Vict. c. 97, s. 3.

(*o*) *Holmes v. Mitchell* (1859), 7 C. B. N. S. 361; 28 L. J. C. P. 301.

(*p*) *Bill v. Bament* (1841), 9 M. & W. 36; *Lucas v. Dixon* (1889), 22 Q. B. D. 357; 58 L. J. Q. B.

161.

(*q*) *Vandenbergh v. Spooner* (1866), L. R. 1 Ex. 316; 35 L. J. Ex. 201; *Sale v. Lambert* (1874), L. R. 18 Eq. 1; 43 L. J. Ch. 470; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; 48 L. J. Ch. 10.

- or "friend" of a named agent, that is not sufficient; the reason given being, in the language of Lord Cairns, that the former description "is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise"; the reason against the latter description being that, in order to find out who is the vendor, client, or friend, you must go into evidence on which there might possibly, as in *Potter v. Duffield* (*r*), be a conflict, and that, says the late Master of the Rolls in the last-named case, "is exactly what the Act says shall not be decided by parol evidence." "I should be thrown," he continues, "on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing" (*s*). So, too, when upon a contract for a mortgage of land, the solicitor for the intending mortgagor wrote a letter in which he said that he had called on "the solicitors to the proposing lender, and had arranged the proposed loan," it was recently held (*t*) not to be a sufficient description of the intended mortgagee. The terms also must be stated, *e.g.*, the price, if settled (*u*). In *Ashcroft v. Morrin* (*x*), it was held that an order for goods "on moderate terms" was sufficient to satisfy the statute.
- Terms.** The *subject-matter* of a contract of sale need not be described very precisely, parol evidence being admissible for the purpose of identification. Thus, "the property in Cable Street" (*y*), "the house in Newport" (*z*), and "the land bought of Mr. Peters" (*a*), have been held to be sufficient descriptions. A memorandum may be sufficient although addressed to a third party (*b*), and even though repudiating a contract (*c*).
- Subject-matter.**
- Signature.** The signature may come in any part of the document, even at the top, as "*I, James Crockford, agree to sell*" (*d*). But it must govern every part of the instrument (*e*). It may be by initials

(*r*) (1874), L. R. 18 Eq. 4; 43 L. J. Ch. 472.

(*s*) Per Kay, J., in *Jarrett v. Hunter* (1886), 34 Ch. D. 182; 56 L. J. Ch. 141. See also *Stokell v. Niven* (1889), W. N. 46, 100; 61 L. T. 18; *Coombs v. Wilkes*, [1891] 3 Ch. 77; 61 L. J. Ch. 42.

(*t*) *Pattle v. Anstruther* (1894), 69 L. T. 174; 4 R. 470.

(*u*) *Elmore v. Kingscote* (1826), 5 B. & C. 583; 8 D. & R. 343; *Acebal v. Levy* (1834), 10 Bing. 376; 4 M. & S. 217; but see *Hoadley v. McLaine* (1834), 10 Bing. 482; 4 M. & S. 340.

(*x*) (1842), 4 M. & G. 450; 6

Jur. 783.

(*y*) *Bleakley v. Smith* (1840), 11 Sim. 150.

(*z*) *Owen v. Thomas* (1834), 3 M. & K. 353.

(*a*) *Rose v. Cunynghame* (1805), 11 Ves. 550.

(*b*) *Gibson v. Holland* (1865), L. R. 1 C. P. 1; 35 L. J. C. P. 5.

(*c*) *Bailey v. Sweeting* (1861), 9 C. B. N. S. 857; 30 L. J. C. P. 150; *Elliott v. Dean* (1884), 1 C. & E. 283.

(*d*) *Knight v. Crockford* (1794), 1 Esp. 190.

(*e*) *Caton v. Caton* (1867), L. R. 2 H. L. 127; 36 L. J. Ch. 886.

(probably) or mark (even though the person can write (*f*)), and it may be printed or stamped (*g*). But there must be something in the nature of a signature. A letter beginning "*My dear Robert*" and ending with the words, "*Do me the justice to believe me the most affectionate of mothers,*" without the writer's name appearing in it, was held insufficient (*h*). "It is not enough," said the Court, "that the party may be identified. He is required to sign. And after you have completely identified, still the question remains, whether he has signed or not." A telegram is a sufficient (*i*) memorandum, and even a recital in a will may be sufficient (*k*).

In the recent case of *Evans v. Hoare* (*l*), the following document was drawn up by a clerk of the defendants, named Harding, who was acting with the defendants' authority, and presented by Harding to the plaintiff for signature, and duly signed by the plaintiff:—

" 5, Campbell Terrace, Leytonstone, E.,
" Feb. 19, 1890.

" Messrs. Hoare, Man & Co., 26, 29, Budge Row, London, E.C.

" Gentlemen,—In consideration of your advancing my salary to the sum of £130 per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of £130 per annum aforesaid, payable monthly as hitherto.

" Yours obediently,
" George E. Evans."

In an action for wrongful dismissal, it was held that the defendants' name, inserted in the letter by their authorized agent, amounted to a signature binding on the defendants within sect. 4 of the Statute of Frauds, and that plaintiff was entitled to recover.

The signature required is that of "the party to be charged" only, so that the party who has not signed, and would not be bound himself, can enforce the contract against the party who has signed (*m*). A signed proposal accepted verbally will satisfy the statute (*n*). The memorandum need not be signed by the party to be charged himself; it may be signed by "some other person thereunto by him lawfully authorized." This authority may be conferred without writing. But one of the contracting parties can-

Signature
by agent.

(*f*) *Baker v. Dening* (1838), 8 Ad. & E. 91.

(*g*) *Saunderson v. Jackson* (1800), 2 B. & P. 238; 3 Esp. 180.

(*h*) *Selby v. Selby* (1817), 3 Mer. 2.

(*i*) *Godwin v. Francis* (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*k*) *In re Hoyle*, [1893] 1 Ch. 81; 62 L. J. Ch. 182.

(*l*) [1892] 1 Q. B. 593; 61 L. J. Q. B. 470.

(*m*) *Laythoarp v. Bryant* (1836), 2 Bing. N. C. 735; 3 Scott, 238.

(*n*) *Reuss v. Picksley* (1866), L. R. 1 Ex. 342; 35 L. J. Ex. 218.

not be the other's agent for the purpose of signing (*o*); and for this reason an auctioneer cannot successfully sue on a contract which he has signed as agent (*p*); and, although under ordinary circumstances, the auctioneer's clerk is not the purchaser's agent, yet there may exist special circumstances from which the clerk's authority to sign may be inferred so as to entitle the auctioneer to sue (*q*).

Bought and sold notes.

Many contracts are made through brokers, and, when a broker is the agent of both parties, his signature binds them. A broker—according to the general practice—first makes an entry of the contract in his book and signs it, and then sends a copy to each party, the “bought note” to the buyer and the “sold note” to the seller; and these notes, if they agree, constitute a sufficient memorandum to satisfy the statute (*r*). If they do not agree, but vary materially, they do not constitute a binding contract (*s*). If there are no bought and sold notes, or if they disagree, it seems that recourse may be had to the entry in the broker's book (*t*).

Different documents.

The terms of a contract, it is to be observed, need not all appear in the same document. But the connection between various documents cannot be proved by oral evidence (*u*).

Difference in wording between 4th and 17th sections.

It should be noticed that there is a difference in the wording between the 4th and the 17th sections. The 4th says merely, “*no action shall be brought*,” while the 17th declares that no contract within it shall be “*allowed to be good*.” The 4th section, therefore, refers only to the procedure, and does not affect the intrinsic validity of the contract (*x*); and now, by sect. 4 of the Sale of Goods Act, 1893 (*y*), which has replaced the 17th section of the Statute of Frauds, the words are, “A contract . . . *shall not be enforceable by action unless*,” &c.

(*o*) *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720; 43 L. J. Q. B. 312.

(*p*) *Farebrother v. Simmons* (1822), 5 B. & Ald. 333.

(*q*) *Bird v. Boulter* (1833), 4 B. & Ad. 413; 1 N. & M. 313; *Peiree v. Corr* (1874), L. R. 9 Q. B. at p. 215; 43 L. J. Q. B. 52; *Sims v. Landray*, [1894] 2 Ch. 318; 63 L. J. Ch. 535.

(*r*) *Rucker v. Cammeyer* (1794), 1 Esp. 105.

(*s*) *Grant v. Fletcher* (1826), 5 B. & C. 436; 8 D. & R. 59.

(*t*) *Siewwright v. Archibald* (1851), 17 Q. B. 103; 20 L. J. Q. B. 529.

(*u*) See *Boydell v. Drummond*, *post*, p. 106.

(*x*) *Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1; and see *Williams v. Wheeler* (1860), 8 C. B. N. S. 299; and *Britain v. Rossiter* (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362.

(*y*) 56 & 57 Vict. c. 71.

Interests in or concerning Lands.CROSBY *v.* WADSWORTH. (1805)

[30.]

[6 EAST, 602; 5 SMITH, 559.]

Farmer Wadsworth, of Claypole, in Lincolnshire, had a field of grass, which Crosby, with an eye to hay, desired to purchase. Meeting casually one day in June, it was agreed between them in conversation that Crosby should have the grass for 20 guineas, only he was to have the trouble of mowing and making it into hay. Soon afterwards, however, Wadsworth got a better offer for his grass, so he coolly proceeded to break his word to Crosby. The latter brought this action for breach of contract, but unfortunately took nothing by that, as it was held that *the contract was one which had to do with the land, and therefore should have been in writing*, as required by the 4th section of the Statute of Frauds.

The case that is always contrasted with Crosby *v.* Wadsworth is Parker *v.* Staniland^(z), where it was held that a contract for the sale of *growing potatoes* was *not* a contract for the sale of any interest in or concerning land, the potatoes being regarded as chattels stored in a warehouse.

It is not easy to extract from the cases a clear rule for determining when, and when not, a sale of growing crops is a sale of an "interest in or concerning" lands. In Benjamin's "Sale of Personal Property," however, the law is summarised as follows (*a*) :—

"Growing crops, if FRUCTUS INDUSTRIALES, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if FRUCTUS NATURALES, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section; but if

Growing potatoes.

Difficulty of laying down clear rule.

Mr. Benjamin's rule.

^(z) (1809), 11 East, 362.^(a) 4th ed., p. 121.

the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th and not by the 4th section of the statute."

For cases in support of this proposition reference should be made (in addition to the leading case and to *Parker v. Staniland*) to *Smith v. Surman* (*b*) (standing timber to be cut by the seller—held *not* within sect. 4); *Warwick v. Bruce* (*c*), and *Sainsbury v. Matthews* (*d*) (potatoes to be dug by the purchaser when ripe—held *not* within sect. 4); *Washburn v. Burrows* (*e*) (growing grass to be cut by the seller—held *not* within sect. 4); *Evans v. Roberts* (*f*) (potatoes to be turned up by the seller—held *not* within sect. 4); *Rodwell v. Phillips* (*g*) (growing fruit—held *within* sect. 4); and *Marshall v. Green* (*h*) (growing timber to be cut by the purchaser—held *not* within sect. 4).

Sale of
Goods Act,
1893.

The extent to which, if at all, the law as above stated has been altered by the Sale of Goods Act, 1893 (*i*), is difficult to determine. Sect. 62 (1) defines "goods" as including "all chattels personal other than things in action and money *emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale.*"

It is noticeable that the Act does not say *who* is to sever, or *when* the severance is to take place, but lays stress only on the part of the *agreement* as to severance pursuant to the contract. For a full discussion of the probable effect of this section, reference should be made to "A Commentary on the Sale of Goods Act, 1893," by Ker and Pearson-Gee, pp. 23—27.

Agree-
ments
requiring
to be in
writing.

As to things other than growing crops, the following agreements have been held to "concern" land and require writing:—

To enable a person to take *water from a well* (*k*);

To convey an *equity of redemption* (*l*);

To let or take *furnished lodgings* (*m*);

To let *machinery affixed to a building* (*n*);

(*b*) (1829), 9 B. & C. 561; 4 M. & R. 455.

(*c*) (1813), 2 M. & S. 205.

(*d*) (1838), 4 M. & W. 343.

(*e*) (1847), 1 Ex. 107.

(*f*) (1826), 5 B. & C. 829; 8 D. & R. 611.

(*g*) (1842), 9 M. & W. 502; 11 L. J. Ex. 217.

(*h*) (1875), 1 C. P. D. 35; 45 L. J. C. P. 153; distinguished in

Lavery v. Purcell (1888), 39 Ch. D. 508; 57 L. J. Ch. 570.

(*i*) 56 & 57 Vict. c. 71.

(*k*) *Tyler v. Bennett* (1836), 5 Ad. & E. 377.

(*l*) *Massey v. Johnson* (1847), 1 Ex. 255; 17 L. J. Ex. 182.

(*m*) *Inman v. Stamp* (1815), 1 Stark. 12.

(*n*) *Jarvis v. Jarvis* (1894), 63 L. J. Ch. 10; 69 L. T. 412.

To *surrender a tenancy*, and try and get the landlord to accept the other contracting party as tenant (*o*);

To sell *shares in a mine* (*p*); and

To sell *debentures in a company* that create a "floating charge" on its property consisting in part of leaseholds (*q*);

An *agreement for a lease*, or for the sale, assignment, or transfer of a leasehold estate (*r*); and

A grant of a *right to shoot* over land, and take away a part of the game killed (*s*).

But the following agreements have been held *not* to be within sect. 4 :—

To build a *water-closet* for a tenant (*t*);

For *board and lodging* merely (*u*);

As to the cost of *investigating the title* to land (*x*);

To sell *shares* in railway, canal, dock, banking, insurance, or gas companies (*y*);

To sell trees which have been blown down and so severed from the soil (*z*);

Although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire and to assign his share in the partnership assets is (as was held in *Gray v. Smith* (*a*)) an agreement to assign an interest in land and must be evidenced by a sufficient memorandum in writing;

And in the equity leading case of *Russell v. Russell* (*b*) it was held that an equitable mortgage by *deposit of title-deeds* was valid, notwithstanding the 4th section of the Statute of Frauds, on the ground that it was not a contract *to be* performed, but was one already executed.

Agreements which need not be in writing.

(*o*) *Cocking v. Ward* (1845), 15 L. J. C. P. 245; 1 C. B. 858.

(*p*) *Boyce v. Green* (1826), Batty, 608.

(*q*) *Driver v. Broad*, [1893] 1 Q. B. 744; 63 L. J. Q. B. 12.

(*r*) *Poulteney v. Holmes* (1721), Str. 405.

(*s*) *Webber v. Lee* (1882), 9 Q. B. D. 315; 51 L. J. Q. B. 485.

(*t*) *Mann v. Nunn* (1874), 43 L. J. C. P. 241; 30 L. T. 526.

(*u*) *Wright v. Stavert* (1860), 2

E. & E. 721; 29 L. J. Q. B. 161.

(*x*) *Jeakes v. White* (1851), 6 Ex. 873; 21 L. J. Ex. 265.

(*y*) *Bligh v. Brent* (1837), 2 Y. & C. 268; *Bradley v. Holdsworth* (1838), 3 M. & W. 422; 1 H. & H. 156; and *Duncuft v. Albrecht* (1841), 12 Sim. 189.

(*z*) *In re Ainslie* (1885), 30 Ch. D. 485; 55 L. J. Ch. 615.

(*a*) (1889), 43 Ch. D. 208; 59 L. J. Ch. 145.

(*b*) (1783), 1 Bro. C. C. 269.

Not to be performed within the space of One Year.

[31.]

PETER v. COMPTON. (1694)

[SKIN. 353.]

“Peter, my boy,” said Compton, festively, “what do you say to this? *If you will give me a guinea now, I will give you 1000 guineas on your wedding day.*” “Agreed,” cried Peter, and paid down the guinea, which Compton pocketed, thinking it good business.

Two years afterwards Peter married, and claimed the 1000 guineas. Compton declined to pay, because, he said, the 4th section of the Statute of Frauds provided that an “agreement that is not to be performed within the space of one year from the making thereof” must be in writing.

It was held, however, that *the statute only applies to agreements which are in their terms incapable of performance within the year*, whereas Peter might have got married the very next day.

Agreements incapable of performance within the year.

If you were to engage a person for a year's service *from next Tuesday fortnight*, the agreement between yourself and the servant would clearly be one which by its terms was *incapable of performance within the year*; and therefore it would not be binding unless in writing (*c*). A general hiring, however, which is construed to be for a year, need not be in writing (*d*).

Condition which may put an end to agreement within year.

Supposing the agreement to be *in its terms* incapable of performance within the year, it must still be in writing, though there is a condition which may put an end to it within the year. Thus, a contract with a coachmaker to hire a carriage from him for five years has been held altogether void, because not in writing, although it was part of the agreement that either party might put an end to it at a moment's notice (*e*). On the same principle, a contract

(*c*) *Bracegirdle v. Heald* (1818), 1 B. & Ald. 722; and see *Britain v. Rossiter* (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362.

(*d*) *Beeston v. Collyer* (1827), 4 Bing. 309; 2 C. & P. 607.

(*e*) *Birch v. Liverpool* (1829), 9 B. & C. 392.

between a solicitor and an insurance company that the former shall be the company's solicitor *during his whole professional life and so long as they continue a company*, must be in writing, notwithstanding the chance of its terminating by death, resignation, or otherwise (*f*).

On the other hand, a promise by a man to a woman he had cohabited with to pay her £300 a year *so long as she should maintain and educate their seven illegitimate children*, has been held *not* within the statute (*g*).

So has a contract for valuable consideration to leave a sum of money whenever the promisor should die (*h*).

The question in all these cases is, Is the contract *prima facie* incapable of performance within the year?

The section applies only to contracts which are not to be performed *on either side* within the year; so that *Peter v. Compton* might have been decided in the same way on the ground that one of the parties was wholly to execute his part of the contract within the year. The leading case on this point is *Donellan v. Read* (*i*), an action for extra rent payable in pursuance of the terms of a verbal agreement by which the landlord was forthwith to do some repairs.

See also *Bevan v. Carr* (1885), 1 C. & E. 499; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; 54 L. J. Ch. 1035; and *Johnstone v. Mappin* (1891), 60 L. J. Ch. 241; 64 L. T. 48: where, before the marriage of A. and B., B.'s father verbally promised to pay his daughter £300 a year, and, in consequence of that promise, A. and B. married; and, upon the father's refusal to pay this sum, it was held that the marriage was *not* a part performance of such a parol agreement, and that as the promise was not in writing it could not be enforced.

(*f*) *Eley v. Positive Assurance Co.* (1875), 1 Ex. Div. 20, 88; 45 L. J. Ex. 58.

(*g*) *Knowlman v. Bluett* (1874), L. R. 9 Ex. 1, 307; 43 L. J. Ex. 151; and see *McGregor v.*

McGregor (1888), 21 Q. B. D. 424; 57 L. J. Q. B. 591; and *Hammond v. Meadows* (1889), W. N. 108.

(*h*) *Ridley v. Ridley* (1865), 34 L. J. Ch. 462; 34 Beav. 478.

(*i*) (1832), 3 B. & Ad. 899.

*Goods, Wares, or Merchandises for the price of
Ten Pounds.*

[32.]

BALDEY v. PARKER. (1823)

[2 B. & C. 37; 3 D. & R. 220.]

Mr. Parker went one day into a linendraper's shop, and bargained for a number of trifling articles, a separate price being agreed on for each, and no one article being priced so high as 10*l*. The articles that Mr. Parker decided to buy he marked with a pencil, or assisted in cutting from a larger bulk. Then he went home, desiring that an account of the whole should be sent after him. This was done, and the sum Parker was asked to pay was 70*l*., *minus* 5 per cent. discount for ready money. This discount he quarrelled with, not considering it liberal enough, and, when the goods were sent to him, he refused to accept them.

This was an action by the linendraper against his recalcitrant customer, and the main question was whether the contract was one "for the sale of goods, wares, or merchandises for the price of 10*l*." within the 17th section of the Statute of Frauds. The question was decided in the affirmative, the contract having been an entire one, and "it being the intention of that statute," as Holroyd, J., said, "that, where the contract, *either at the commencement or at the conclusion*, amounted to, or exceeded the value of 10*l*., it should not bind unless the requisites there mentioned were complied with." "The danger," he added, "of false testimony is quite as great where the bargain is ultimately of the value of 10*l*. as if it had been originally of that amount."

Lots at
auction.

Where, however, at an auction several successive lots are knocked

down to the same person, a distinct contract arises as to each lot (*k*).

But it has been held that, although *at the time of the contract it is uncertain* whether the subject-matter of the sale will be worth 10*l*, or not (*e.g.*, suppose the sale to be of a future crop of turnip seed, which may or may not turn out a success), yet if that figure is ultimately reached, the statute applies (*l*). It is to be observed that, though the word in the 17th section is "*price*," the effect of sect. 7 of Lord Tenterden's Act (*m*), which is to be read with the 17th section of the Statute of Frauds, as if incorporated therein, is to substitute the word "*value*" (*n*).

Future crop.

"Price" means value.

Although both the 17th section of the Statute of Frauds and the 7th section of Lord Tenterden's Act have been repealed by the Sale of Goods Act, 1893, they have been re-enacted in the 4th section of that Act, and consequently the existing case law on the subject still applies.

Sale of Goods Act, 1893, s. 1.

The words of the 17th section, "goods, wares, and merchandises," do not apply, it has been held, to shares (*o*), stocks (*p*), documents of title (*q*), choses in action, and other incorporeal rights and property (*r*).

Shares.

The word "goods" is substituted in the 4th section of the Sale of Goods Act, 1893, for "goods, wares, and merchandises" in the 17th section of the Statute of Frauds; and "goods" are, in sect. 62 of the 1893 Act, defined as "all chattels personal other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." Incorporeal rights and property are consequently still excluded.

In the leading case an attempt was made to bring the purchaser within the other part of the 17th section by showing that he had "accepted and actually received" the goods. The continuance of the vendor's lien, however, was held to be fatal to such a contention.

(*k*) Sect. 58 (1) of 56 & 57 Vict. c. 71; *Emmerson v. Heelis* (1809), 2 Taunt. 38; and see *Rugg v. Minett* (1809), 11 East, 210.

(*l*) *Watts v. Friend* (1830), 10 B. & C. 446.

(*m*) 9 Geo. IV. c. 14.

(*n*) *Harman v. Reeve* (1856), 18 C. B. 587; 25 L. J. C. P. 257.

(*o*) *Humble v. Mitchell* (1839), 11 A. & E. 205; 3 P. & D. 141; *Duncuft v. Albrecht* (1841), 12

Sim. 189; *Bradley v. Holdsworth* (1838), 3 M. & W. 422; 1 H. & H. 156; *Colonial Bank v. Whinney* (1885), 30 Ch. D. 261; 55 L. J. Ch. 585.

(*p*) *Heseltine v. Siggers* (1848), 1 Ex. 856; 18 L. J. Ex. 166.

(*q*) *Freeman v. Appleyard* (1862), 32 L. J. Ex. 175.

(*r*) *Bowlby v. Bell* (1846), 3 C. B. 284; 16 L. J. C. P. 18.

Accept and actually Receive.

[33.]

ELMORE *v.* STONE. (1809)

[1 TAUNT. 458.]

Elmore was a livery stable-keeper, and had a couple of horses for sale, for which he wanted £200. Stone admired the horses, but not the price. Finding, however, he could not get them for less, he sent word he would take the horses, "but, as he had neither servant nor stable, Mr. Elmore must keep them at livery for him."

In consequence of this message, Elmore removed the horses from his sale stable into another stable, which he called his livery stable. In an action which he brought for the price, the question was whether such removal was a sufficient constructive delivery to take the case out of the Statute of Frauds, and it was held that it was, as Elmore *from that time held the horses, not as owner, but as any other livery stable-keeper might have done.*

[34.]

TEMPEST *v.* FITZGERALD. (1820)

[3 B. & A. 680.]

Mr. Fitzgerald, paying a visit to Mr. Tempest, took a fancy to one of his host's horses, and finally agreed to buy it for 45 guineas. He could not do with the animal just then, but he said he would call for it on his way to Doncaster races, and Tempest agreed to take care of it in the meantime. Both parties understood the transaction to be a ready-money bargain. Just before the races Fitzgerald returned to Tempest's house, galloped the horse,

and gave various directions about it, treated it in every way as his own, and asked his host to keep it a week longer, saying he would return immediately after the races, pay the 45 guineas, and take the horse away. Unfortunately, during the Doncaster race-week, the horse died, and mutual recriminations ensued; Tempest contending that the loss ought to fall on Fitzgerald, as the property in the horse had passed to him, Fitzgerald maintaining the opposite view. The latter was the view adopted by the judges, as they considered there had been no such receipt as would satisfy the Statute of Frauds.

While the 17th section of the Statute of Frauds inculcates on contracting parties the importance and desirability of writing, when the value of the goods sold exceeds £10, it at the same time permits them, in the absence of writing, to bind themselves if certain other circumstances are present. Writing, for instance, is unnecessary if "the buyer shall *accept* part of the goods so sold, *and actually receive* the same." The 4th section of the Sale of Goods Act, 1893, which re-enacts the 17th section of the Statute of Frauds, also provides that "there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not" (s). The words of the statute have been so interpreted that they are satisfied very often by a *constructive acceptance*. In *Elmore v. Stone*, for instance, the seller changes his character, and becomes a bailee for the purchaser. Similarly, if a man sold his horse, but asked the purchaser if he would be kind enough to let him keep it a few days longer, and the purchaser consented, there would be a sufficient acceptance (t). So there was held to be evidence of acceptance in a case where the defendant, having verbally agreed to buy a haystack of the plaintiff's, resold part of it to a third person, who removed it (u).

Acceptance and receipt.

Sale of Goods Act, 1893, s. 4, sub-s. (3).

Constructive acceptance.

"It is of great consequence," said Lord Kenyon, C.J., in that case, "to preserve unimpaired the several provisions of the Statute of Frauds, *which is one of the wisest laws in our statute book*. My

(s) See *Abbott v. Wolsey*, [1895] 2 Q. B. 97; 11 T. L. R. 414.

(t) *Marvin v. Wallis* (1856), 6 E. & B. 726; 25 L. J. Q. B. 369; *Castle v. Swoorder* (1861), 6 H. & N. 828; 30 L. J. Ex. 310; *Beaumont v. Brengeri* (1847), 5 C. B. 301.

But see *Carter v. Touissant* (1822), 5 B. & Al. 855; 1 D. & R. 515.

(u) *Chaplin v. Rogers* (1800), 1 East, 192; *Parker v. Wallis* (1855), 5 E. & B. 21; *Bill v. Bament* (1841), 9 M. & W. 36.

opinion will not infringe upon it; for here the report states that the question was specifically left to the jury whether or not there was an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that, in order to take a contract for the sale of goods of this value out of it, there must either be a part delivery of the thing, or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery. *Where goods are ponderous, and incapable (as here) of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property.*" As to what amounts to an acceptance within the statute, compare the recent cases of *Page v. Morgan* (1885), 15 Q. B. D. 288; 54 L. J. Q. B. 434; and *Taylor v. Smith*, [1893] 2 Q. B. 65; 61 L. J. Q. B. 331.

An acceptance may precede, be contemporaneous with, or subsequent to, an actual receipt (*v*). It must, however, take place with the consent of the seller. Accordingly, an acceptance subsequent to the seller's disaffirmance of the, as yet, unenforceable contract is unavailing (*x*). Acceptance of a sample is sufficient, if it is taken as part of the bulk (*y*).

Effect of
accept-
ance.

The effect of the acceptance required by the statute is not to preclude a party from disputing that the contract has been properly carried out, but simply to prevent him from objecting that the contract is not in writing (*z*).

Actual
receipt.

The 4th section of the Sale of Goods Act, 1893, does not give any definition of *actual receipt*.

An "actual receipt" may be said *generally* to take place when there is a delivery of the goods, or of the documents of title thereto, to or into the control of the buyer, *so as to divest the seller's lien* in respect thereof. There is, however, one important exception to this rule, namely, in the case where the seller becomes bailee for the buyer: for this is sufficient to constitute an "actual receipt," though it does not divest the seller's lien (*u*).

(*v*) *Cusack v. Robinson* (1861), 1 B. & S. 299; 30 L. J. Q. B. 261.

(*x*) *Taylor v. Wakefield* (1856), 6 E. & B. 765; 2 Jur. N. S. 1086; *Smith v. Hudson* (1865), 6 B. & S. 431; 34 L. J. Q. B. 145.

(*y*) *Hinde v. Whitehouse* (1806), 7 East. 558; 3 Smith, 528; *Gardner v. Grout* (1857), 2 C. B. N. S. 340.

(*z*) *Morton v. Tibbett* (1850), 15 Q. B. 428; 19 L. J. Q. B. 382; and *Grimoldby v. Wells* (1875), L. R. 10 C. P. 391; 44 L. J. C. P. 203. And see sect. 4, sub-s. (3), of the Sale of Goods Act, 1893.

(*u*) See sect. 41, sub-s. (2) of the Sale of Goods Act, 1893, which extends the previous law as laid

If the goods are already in the buyer's possession, an actual receipt is proved by showing that he has done acts inconsistent with the supposition that his former possession has remained unchanged. These acts may be proved by parol, and it is a question of fact for the jury whether the acts were done because the buyer had taken to the goods as owner (*b*).

Goods in
buyer's
possession.

Where the goods are in possession of a third person as bailee for the seller, an "actual receipt" takes place when the seller, the buyer, and the third person agree together that the latter shall cease to hold the goods for the seller, and shall hold them for the buyer. It is important to observe that all of the parties must join in this agreement, for the agent of the seller cannot be converted into an agent for the buyer without his knowledge and consent (*c*).

Goods in
possession
of third
person.

It is well settled that the delivery of goods to a common carrier, *a fortiori*, to one specially designated by the buyer, for conveyance to him, or to a place designated by him, constitutes an actual receipt by the buyer. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent, the latter, in employing the carrier, being considered as an agent of the former for that purpose (*d*).

Delivery to
carrier.

It is important to remark that the carrier only represents the buyer for the purpose of receiving, not accepting, the goods (*e*).

Writing is also unnecessary if the buyer gives "something in earnest to bind the bargain or in part of payment." If what the buyer gives is money, it presumably forms part of the price; otherwise it is in the nature of a pledge. There must be an actual transference. Therefore it is not sufficient for the buyer to draw a shilling across the hand of the seller, and then put it into his pocket again (*f*). Nor will the buyer's relinquishment of a debt do (*g*).

Earnest
and part
payment.

down in *Townley v. Crump* (1836), 4 A. & E. 58; 5 N. & M. 606; and *Grice v. Richardson* (1877), 3 App. Cas. 319; 47 L. J. P. C. 48; following *Miles v. Gorton* (1834), 2 C. & M. 504; which was limited to cases where the buyer was insolvent.

(*b*) See *Edom v. Dudfield* (1841), 1 Q. B. 302; *Benjamin on Sale*, p. 160.

(*c*) *Farina v. Home* (1816), 16 M. & W. 119; 16 L. J. Ex. 73; and per *Crompton, J.*, in *Castle v.*

Sworder (1861), 30 L. J. Ex. 310; 6 H. & N. 828; *Benjamin on Sale*, p. 161.

(*d*) *Dawes v. Peck* (1799), 8 T. R. 330; 3 Esp. 12; *Dunlop v. Lambert* (1839), 6 Cl. & Fin. 600; *Wait v. Baker* (1848), 2 Ex. 1; 17 L. J. Ex. 307; *Benjamin on Sale*, p. 169.

(*e*) *Hanson v. Armitage* (1822), 5 B. & A. 557; 1 D. & R. 128.

(*f*) *Blenkinsop v. Clayton* (1817), 7 Taunt. 597; 1 Moore, 328.

(*g*) *Walker v. Nussey* (1847), 16 M. & W. 302; 16 L. J. Ex. 120.

Goods not yet in Existence.

[35.]

LEE v. GRIFFIN. (1861)

[1 B. & S. 272; 30 L. J. Q. B. 252.]

This was an action against an executor to recover the price of artificial teeth made for his testatrix, who had died before they were ready. The price of the teeth being £21, and there being no writing, the 17th section of the Statute of Frauds prevented the dentist from recovering for goods sold and delivered, but it was suggested that the count for work, labour, and materials might be sustained. This view, however, was not adopted, the rule being stated to be that *if the contract be such that when carried out it would result in the sale of a chattel*, the party cannot sue for work and labour.

Lord
Tenter-
den's Act.

Goods not in existence at the time of the contract, but which were to be made and delivered at a future time, were held not to be within the 17th section. Lord Tenterden's Act (*h*), however, brought them within it, and contracts relating to such goods must now be in writing, just as much as those relating to goods already in existence. The great question, when such a contract has not been reduced to writing, is—Is this a contract for the sale of goods so as to be within the statute, or is it a contract for work and labour, so that writing is unnecessary? On this constantly arising question *Lee v. Griffin* is an important authority, and must be carefully distinguished from *Clay v. Yates* (*i*), where it was held that an agreement by a printer to print a book, although it involved

Clay v.
Yates.

(*h*) 9 Geo. IV. c. 14, s. 7, repealed by the Sale of Goods Act, 1893, but re-affirmed by sect. 4, sub-s. (2), which provides that, "The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may

be requisite for the making or completing thereof, or rendering the same fit for delivery."

(*i*) (1856), 25 L. J. Ex. 237; 1 H. & N. 73. But see *Isaacs v. Hardy* (1884), 1 C. & E. 287, where it was held that a contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price was a contract for the sale of a chattel.

finding materials, was not within the statute, and need not be in writing. At one time it was thought that the test to be applied to such cases was *whether the value of the work exceeded the value of the materials*; but that rule seems now to have yielded to the one laid down in the leading case.

But contracts for the sale of goods must be distinguished from contracts for the affixing to the freehold or to another chattel of a moveable thing of any kind. "In such contracts the intention is plainly not to make a sale of moveables, but to make improvements on real property or on another chattel" (*k*). In other words, the complete thing sold is never sold *as a chattel*, nor are its incomplete materials, though chattels, sold at all in the incomplete state (*l*).

Lee *v.* Griffin is also occasionally referred to as an authority on the law relating to exemptions from stamp duty. The following agreements need not be stamped:—

(1.) An agreement or memorandum, the matter whereof is not of the value of £5, or is incapable of pecuniary measurement. Exemptions from stamp duty.
Below £5.

(2.) An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant. Hire of servant.

(3.) An agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise. Sale of goods.

(In the leading case it was held that an agreement to make a chattel and deliver it within a certain time is within the exemption), and

(4.) An agreement or memorandum made between the master and mariners of any ship or vessel for wages or any voyage coastwise from port to port in the United Kingdom. Coasting.

Moreover, when there are several documents, but the papers form in fact only one agreement, only one of them need be stamped. But several stamps are necessary in the case of distinct contracts, though on the same paper (*m*).

When an unstamped instrument in writing, which ought to have been stamped, has been lost, and evidence of its contents cannot be given. If, however, there is no evidence whether it was stamped or not, it is presumed to have been properly stamped (*n*).

If a transaction is capable of being legally proved by other evidence than that of the unstamped document, such evidence is Unstamped receipt.

(*k*) Benjamin on Sale, p. 108, quoting *Tripp v. Armitage* (1839), 4 M. & W. 687; 1 H. & H. 412; *Clark v. Bulmer* (1843), 11 M. & W. 243; and see *Anglo-Egyptian Nav. Co. v. Rennie* (1875), L. R. 10 C. P. 271; 41 L. J. C. P. 130.

(*l*) *Ker and Pearson v. Gee* in

"Commentary on Sale of Goods Act," p. 4, quoting *per cur.* in *Clark v. Bulmer*, *supra*, at p. 250.

(*m*) *Powell v. Edmunds* (1810), 12 East, 6.

(*n*) *Marine Investment Co. v. Haviside* (1872), L. R. 5 H. L. 624; 12 L. J. Ch. 173.

admissible. For instance, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by anyone who saw it, and he may use the unstamped receipt to refresh his memory (*o*).

Use of
unstamped
agreement.

An unstamped agreement is admissible for collateral purposes, and in criminal cases. A stamp may be added on payment of the unpaid duty, a penalty of £10, and an additional sum of £1.

Contract contained in several Documents.

[36.]

BOYDELL *v.* DRUMMOND. (1809)

[11 EAST, 142; 2 CAMP. 157.]

This action was brought by some publishers against a person who had agreed to take a quantity of Shaksperian engravings, coming out periodically during a number of years. It was necessary to the publishers' ease to show that the agreement was *in writing*, as it was in its terms *incapable of performance* within the year. There had been a prospectus which the defendant had seen, and a "Shakspeare subscribers, their signatures" book, in which he had entered his name; and the plaintiffs thought this would do. It was held, however, that, as there was no means of connecting the "*Shakspeare Subscribers*" book with the prospectus without oral evidence,—no reference being made by the one to the other—they did not constitute a sufficient memorandum.

Another point the publishers tried to make was that, as the defendant had taken and paid for several numbers, there was sufficient "*performance*" to satisfy the statute.

(*o*) Rambert *v.* Cohen (1803), 4 Esp. 213.

But it was held that *part performance* would not do, for *performance* could not mean anything less than *completion*.

This case is the leading authority for the rule that, though a contract may be collected from several documents, those documents must be *so connected in sense that oral evidence is unnecessary to show their connection*; in other words, they must be left to speak for themselves (*p*). In the recent case of *Oliver v. Hunting* (1890), 44 Ch. D. 205; 59 L. J. Ch. 255, Kekewich, J., thought that modern decisions have extended this principle, and remarked, "wherever parol evidence is required to connect two written documents together, then that evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled, in regarding the construction and meaning of a written document, to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted." The following cases also should be consulted, namely, *Jones v. Victoria Graving Dock* (1877), 2 Q. B. D. 314, 324; 46 L. J. Q. B. 219; *Rishton v. Whatmore* (1878), 8 Ch. D. 467; 47 L. J. Ch. 629; and *Wylson v. Dunn* (1887), 34 Ch. D. 569; 56 L. J. Ch. 855.

"The statute," said Cranworth, C., in an important case (*q*), "is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Thus, a contract to grant a lease on certain specified terms is, of course, good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the case I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but *only in order to show what the writing is which is referred to*. When that fact, which, it is to be observed, is a fact collateral to the contract, is established by parol

Connected
in sense.

Ridgway v.
Wharton.

(*p*) See *Taylor v. Smith*, [1893] 3 D. M. & G. 677; 6 H. L. C. 238; 61 L. J. Q. B. 331.
(*q*) *Ridgway v. Wharton* (1857), 4 App. Ca. 311; 48 L. J. Ch. 846.

evidence, the contract itself is wholly in writing signed by the party."

In a recent case, in which the question was whether a person had broken a contract to sell some land to a builder, it was held that an imperfect and irregular document, purporting to be an agreement by the builder to purchase and pay a deposit, was sufficiently connected with a receipt for the deposit which the seller had signed to form a binding agreement (*r*). So, in *Cave v. Hastings* (*s*), which was an action for breach of an agreement to hire a carriage for a year, it was held that a letter of the defendant's to the plaintiff referring to "our arrangement for the hire of your carriage" was sufficiently connected with a document setting forth the terms of the agreement. *Studds v. Watson* (1884), 28 Ch. Div. 305; 54 L. J. Ch. 626; and *Craig v. Elliott* (1885), 15 L. R. Ir. 257, are to the same effect.

Part per-
formance.

On the effect of part performance the equity leading case of *Lester v. Foxcroft* (*t*) should be referred to. Courts of Equity have long been in the habit when there were acts of part performance, and the nature of the case seemed to require equitable interference, of decreeing specific performance of verbal agreements unenforceable at law, by reason of the 4th section of the Statute of Frauds, as being contracts concerning land. The general rule is that, to justify such interference, the parties must, by reason of the Act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract (*u*). In such cases the Court will try and ascertain what was the oral contract between the parties, and then will give effect to it (*x*). But, as has been often observed, the Court *will enforce, but cannot make* contracts; and therefore where the contract is incomplete, or its terms uncertain, specific performance will not be decreed (*y*). The recent and interesting case of *Maddison v. Alderson* (*z*) may be referred to on this subject. It was a case where a

Maddison
v.
Alderson.

(*r*) *Long v. Millar* (1879), 4 C. P. D. 450; 48 L. J. C. P. 596.

(*s*) (1881), 7 Q. B. D. 125; 50 L. J. Q. B. 575. But see *Coombs v. Wilkes*, [1891] 3 Ch. 77; 61 L. J. Ch. 42.

(*t*) (1701), Colles' P. C. 108. And see the notes to this case in *White and Tudor's Leading Cases in Equity*, 6th ed., p. 881.

(*u*) *Dale v. Hamilton* (1846), 2 Phil. 266; 5 Hare, 369; and see *Surcome v. Pinniger* (1853), 3 D. M. & G. 571.

(*x*) *Mundy v. Jolliffe* (1839), 5

Myl. & Cr. 167.

(*y*) *Thynne v. Glengall* (1848), 2 H. L. C. 131; *Williams v. Evans* (1875), L. R. 19 Eq. 547; 32 L. T. 360.

(*z*) (1883), 8 App. Ca. 467; 52 L. J. Q. B. 737. See also *May v. Thomson* (1882), 20 Ch. D. 705; 51 L. J. Ch. 917; *Britain v. Rossiter* (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362; *Humphreys v. Green* (1882), 10 Q. B. D. 148; 52 L. J. Q. B. 140; and *M'Manus v. Cooke* (1887), 35 Ch. D. 681; 56 L. J. Ch. 662.

woman had been induced by an old Yorkshire farmer to serve him as housekeeper without any wages for a number of years on the faith of his verbal promise to make a will leaving her a life estate in the farm. It was held that the continuance in the farmer's service in reliance on this promise was no answer to the 4th section of the Statute of Frauds, because it was not unequivocally and in its own nature referable to the contract.

NEGOTIABLE INSTRUMENTS.

*Negotiable Instruments are Transferable like Cash
on Delivery.*

[37.]

MILLER v. RACE. (1791)

[1 BURR. 452.]

One December night, about the middle of the last century, the mail from London to the West was attacked by highwaymen. Amongst other things taken was a banknote for £21 10s., which a Mr. Finney of London was sending down by the general post to a client in Oxfordshire. The next day the news of the disaster reached the ears of Mr. Finney, who rushed off immediately to the bank and stopped payment of the note.

A few days afterwards, the plaintiff, who had come by the note quite honestly and had given value for it, presented it at the bank; but Mr. Race, one of the bank clerks, not only refused to cash it, but even to hand it back. Miller therefore sued him, and succeeded in making him cash it.

*Nemo dat
quod non
habet.*

Exception
in favour
of nego-
tiable in-
struments.

The leading case engrafts on the well-known rule that *no one can acquire a title to a chattel personal from a man who has himself no title to it* an exception in favour of all negotiable instruments. Whenever a man receives one of these instruments *bonâ fide*, and having given valuable consideration for it, he is not to lose his money because the document's history is of an unsatisfactory

character(*a*). If, however, he receives it *malâ fide*, it is different. Unless taken *malâ fide*.
 A good-for-nothing clerk received some notes and money for his master, and then went and laid them out with the defendant in illegal insurances of lottery tickets. The defendant knew that he was doing wrong: so the clerk's master was allowed, on proving their identity, to recover them(*b*). But *mala fides*, in such cases, must always be distinctly proved; it will not be sufficient to show that the defendant was guilty of carelessness in taking the instrument, if he did not take it dishonestly(*c*). The judgment of Lord Herschell in the *London Joint Stock Bank v. Simmons*(*d*), contains an excellent discussion of the law on this point. After approving the earlier authorities(*e*), which establish the rule that negligence does not invalidate the title of a person taking a negotiable instrument in good faith and for value, the learned lord added:—
 “I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry.”

As to what constitutes a “holder for value,” the recent case of *Holder for value*.
 the *Royal Bank of Scotland v. Tottenham*(*f*) may be referred to. It was there held, that when a person pays a cheque into his bank in order that the amount of it may be placed to the credit of his account, and the amount is so placed, the bank are holders for value of the cheque.

A negotiable instrument has been defined as *an instrument which upon delivery transfers the legal right to the property secured by it to the person to whom it is delivered*. The most familiar negotiable in- Various kinds of negotiable instruments.

(*a*) See, however, the (so-called) important case of *Bank of England v. Vagliano*, [1891] A. C. 107; 60 L. J. Q. B. 145; although the judgments are instructive, Lord Bramwell was not far wrong in saying that “the head-note which will represent the decisions of your Lordships should be in a strictly concrete form, stating the facts and saying that on them it was held that judgment should be for the appellants.”

(*b*) *Clarke v. Shee* (1774), Cowp. 199.

(*c*) *Goodman v. Harvey* (1836, 4 Ad. & E. 870.

(*d*) [1892] A. C. 201; 61 L. J. Ch. 723.

(*e*) Per Parke, B., in *Foster v. Pearson* (1835), 1 C. M. & R. at p. 855; per Lord Brougham in *Bank of Bengal v. Fagan* (1852), 7 Moore, P. C. 72; per Willes, J., in *Raphael v. Bank of England* (1855), 17 C. B. at p. 175. Accordingly, *Gill v. Cubitt* (1824), 3 B. & C. 466, and *Down v. Halling* (1825), 4 B. & C. 330, are overruled on this point.

(*f*) [1894] 2 Q. B. 715; 64 L. J. Q. B. 99; following *Ex parte Richdale* (1882), 19 Ch. D. 409; 51 L. J. Ch. 462.

How negotiable instrument arises.

Crouch and his worthless debenture.

Scrip of foreign government.

Scrip certificates of banking company.

Restricting negotiability.

struments are bills and notes. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer(*g*). To these may be added government bonds, dock warrants, King of Prussia bonds, and all instruments to which by the law merchant or by statute the above incident attaches. It is doubtful whether in England any instrument can become negotiable except by the law merchant or by statute. In 1872, a company called the Credit Foncier of England, issued a debenture for 100*l.* payable to bearer. By-and-by, and after a robbery, this apparently negotiable instrument got into the hands of a Mr. Crouch, who sued on it; but it was held that the company were not bound to pay it, as they had no power to issue a negotiable instrument of a novel kind(*h*). The scrip, however, of a foreign government issued by it on negotiating a loan, which is by the custom of all the stock markets in Europe negotiable, is so regarded by English law(*i*); and so are scrip certificates of a banking company which have for many years been treated as negotiable instruments by bankers, discounters, and people on the Stock Exchange(*k*).

An instrument may be negotiable, though it has not been issued as such by the party who made it; *e.g.*, where the acceptor tore up a bill with the intention of cancelling it, and the drawer surreptitiously pasted the pieces together, and endorsed it away(*l*). It is otherwise, however, if the instrument be issued *incomplete*(*m*).

Negotiability may sometimes be restricted; *e.g.*, a cheque may be crossed(*n*) or a bill specially endorsed(*o*). But if the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not, if he acted reasonably,

(*g*) As to these, see the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3; *In re Boyse* (1886), 33 Ch. D. 612; 56 L. J. Ch. 135; *Chamberlain v. Young*, [1893] 2 Q. B. 206; 63 L. J. Q. B. 28.

(*h*) *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374; 42 L. J. Q. B. 183. But see *Earl of Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333; 57 L. J. Ch. 986; *Venables v. Baring*, [1892] 3 Ch. 537; 61 L. J. Ch. 609; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120; 62 L. J. Ch. 358.

(*i*) *Goodwin v. Robarts* (1876), 1

App. Cas. 476; 45 L. J. Ex. 748.

(*k*) *Rumball v. Metr. Bank* (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346.

(*l*) *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; 28 L. J. C. P. 294. And see *Scholfield v. Lonsborough*, [1895] 1 Q. B. 536; 64 L. J. Q. B. 293.

(*m*) *Baxendale v. Bennett* (1878), 3 Q. B. D. 525; 47 L. J. C. P. 624.

(*n*) 45 & 46 Vict. c. 61, ss. 76-82. And see *National Bank v. Silke*, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199.

(*o*) *Sigourney v. Lloyd* (1828), 8 B. & C. 622; 3 M. & R. 58.

fail to understand that it was accepted, subject to an express qualification (*p*).

An agreement to "renew" a bill means, in the absence of anything to the contrary, that a bill shall be given between the same parties for the same amount, for the same period as and commencing from the date of the expiration of the original bill (*q*). Renewal of bill.

When a bill is not payable on demand, the day on which it falls due is determined as follows:— Computation of time of payment.

(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (*r*).

(2.) When a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3.) When a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance, if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(4.) The term "month" in a bill means calendar month (*s*).

It is provided by the 36th section of the Bills of Exchange Act, 1882 (*t*), that— Negotiation of overdue or dishonoured bill.

"(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

"(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (*u*).

"(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears

(*p*) See *Meyer v. Deeroix*, [1891] A. C. 520; 61 L. J. Q. B. 205.

(*q*) *Barber v. Mackrell* (1892), 67 L. T. 108; 40 W. R. 618. But see also 68 L. T. 29; 41 W. R. 341.

(*r*) But, although the holder may present the bill for payment at any reasonable hour on the day it becomes payable, that is, ordinarily, on the third day of grace, and if it is not then paid may at once give notice of dishonour to the parties

liable upon it; yet even after dishonour he is not entitled (at least when the acceptance is general) to commence an action upon the bill before the expiration of the last day of grace. *Kennedy v. Thomas*, [1894] 2 Q. B. 759; 63 L. J. Q. B. 761.

(*s*) 45 & 46 Vict. c. 61, s. 14.

(*t*) 45 & 46 Vict. c. 61.

(*u*) See *Alcock v. Smith*, [1892] 1 Ch. 238; 61 L. J. Ch. 161.

on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

“(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

“(5.) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.”

Notice of Dishonour.

[38.] BICKERDIKE *v.* BOLLMAN. (1786)

[1 T. R. 405.]

The effect of this case (the narrative of which is too complicated to be worth giving) is this:—Spendfast being in want of money, and knowing the weak good nature of his friend Lighthead, asks him to accept a bill of exchange for him, assuring him that he will never be called on to pay it, and that it is really only a formality. Lighthead consents, and though he gets no consideration whatever for it, accepts a bill drawn on him by Spendfast. The bill finally gets into the hands of Thriftman as holder, and he presents it to Lighthead for payment. Lighthead, of course, dishonours the bill, and uses strong language. Such being the state of the parties, Bickerdike *v.* Bollman decides that Thriftman, the holder, can sue Spendfast, the drawer, without having previously given him notice that Lighthead, the acceptor, has dishonoured the bill, the reason being that the drawer never had any effects in the hands of the drawee, and therefore *could not lose anything by notice not being given him.*

The necessity of cases on this subject has been happily superseded by codification, the 47th, 48th, 49th, and 50th sections of the Bills of Exchange Act, 1882 (*v*), being as follows:—

“47.—(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment, and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid. Dishonour by non-payment.

(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

“48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser (*v*), and any drawer or indorser to whom such notice is not given is discharged; Notice of dishonour and effect of non-notice.
Provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

“49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:— Rules as to notice of dishonour.

(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2.) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party be his principal or not.

(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of

(*v*) 45 & 46 Vict. c. 61.

(*x*) “Notice of dishonour” means notification of dishonour, *i.e.*, formal notice: *Burgh v. Legge* (1839), 5 M. & W. at p. 422, Alderson, B.; *Carter v. Flower* (1847), 16 M. & W. at p. 749, Parke, B. The fact that the drawer or indorser of a

bill knows that it has been dishonoured does not dispense with the necessity for giving him notice of dishonour: *Miers v. Brown* (1843), 11 M. & W. 372; *East v. Smith* (1847), 16 L. J. Q. B. 292; cf. *Caunt v. Thompson* (1849), 18 L. J. C. P. 125; 7 C. B. 400.

the holder and all indorsers subsequent to the party to whom notice is given.

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12.) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b.) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

“50.—(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence. Excuses
for non-
notice and
delay.

(2.) Notice of dishonour is dispensed with—

(a.) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged :

(b.) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :

(c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment :

(d.) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.”

As to the consideration for bills and notes, see *post*, p. 120.

CONSIDERATION.

Adequacy of Consideration not required.

[39.]

THORNBOROW *v.* WHITACRE. (1706)

[2 LD. RAYM. 1164.]

“Farmer Whitacre,” said the cunning Thornborow, “let us strike a bargain. If I pay you a five pound note down now, will you give me 2 rye corns next Monday, 4 on Monday week, 8 on Monday fortnight, and so on,—doubling it every Monday,—for a year.” Whitacre jumped at it; five pounds never were earned so easily. So the thing was settled. But when our yokel friend came to calculate how much rye he should have to deliver he found that it came to *more than was grown in a year in all England*.

Thornborow, however, brought his action, and had the case not been compromised, would probably have succeeded; for the Court intimated that they thought the contract binding, on the ground that there was a consideration; and as for the other point raised for the defendant, that it was an impossible contract, it was only impossible in respect of the defendant’s ability.

Necessity
for con-
sideration.

Adequacy
not
required.

Every promise (when the contract is not by deed) requires a consideration to support it. *Nuda pactio non parit obligationem*. But law courts are satisfied with the *existence* of a consideration, and do not trouble themselves about its *adequacy*. No matter how slight may be the *benefit* to the promisor, or the *detriment* to the promisee (whichever the consideration may happen to be), it is sufficient to

support the promise. In one case a man allowed a friend to take some boilers and weigh them. Afterwards he brought an action against him for not keeping his promise to restore them, after weighing, in as good condition as they were before. For this promise it was held that the mere *allowing to weigh* was a sufficient consideration (a). So, in another case, it was held that the surrender of the possession of a worthless document was a sufficient consideration (b). *Forbearance to sue* in the case of a doubtful claim is also a sufficient consideration (c); and so is a compromise of a *bonâ fide* claim, although it may not be sustainable in law (d). And so is *labour*, though unsuccessful (e). But for a man to do something he is *already bound to do* cannot be a consideration. If, however, the agreement is for the man to do something *slightly in excess of his duty*, it will be enough (f).

Slight acts which may be considered.

Marriage is, in law, a valuable consideration sufficient to support a promise. Thus, in the recent case of *Synge v. Synge* (g), a husband having promised before and in consideration of marriage to leave by will certain hereditaments to his wife conveyed the premises by a deed to a third person; and the Court held that this was a breach of contract producing an immediate cause of action within the rule of *Hochster v. De la Tour* (h).

A curious case on this branch of the law is *Shadwell v. Shadwell* (i), where an amiable old gentleman wrote to his nephew—

Shadwell v. Shadwell.

“My dear L.,

“I am glad to hear of your intended marriage with E. N., and as I promised to assist you at starting, I am happy to tell you that I will pay you 150*l.* yearly during my life, and until your annual income, derived from your profession of a Chancery barrister, shall amount to 600 guineas, of which your own admission will be the only evidence I shall receive or require.

“Your ever affectionate uncle,
“C. S.”

(a) *Bainbridge v. Firmstone* (1838), 8 Ad. & E. 743; 1 P. & D. 2. See also *Coggs v. Bernard* (1704), 2 Ld. Raym. 909, *post*, p. 225.

(b) *Brooks v. Haigh* (1840), 10 Ad. & E. 323; 3 P. & D. 452.

(c) *Longridge v. Dorville* (1821), 5 B. & Ald. 117; and see *Crears v. Hunter* (1887), 19 Q. B. D. 341; 56 L. J. Q. B. 518; *Aldridge v. Aldridge* (1888), 13 P. D. 210; 58 L. J. P. 8.

(d) *Miles v. New Zealand Co.* (1886), 32 Ch. D. 266; 55 L. J. Ch. 801; *Kingford v. Oxenden* (1891), 55 J. P. 182 and 789. But

see *Ex parte Banner* (1881), 17 Ch. D. 480; 44 L. T. 908.

(e) *Lampleigh v. Brathwait*, *post*, p. 123.

(f) *England v. Davidson* (1840), 11 A. & E. 856; 3 P. & D. 594; and *Hartley v. Ponsonby* (1857), 7 E. & B. 872; 26 L. J. Q. B. 322.

(g) [1894] 1 Q. B. 466; 63 L. J. Q. B. 202.

(h) See *post*, p. 330.

(i) (1860), 9 C. B. N. S. 159; 30 L. J. C. P. 145; and see *Bell v. Bassett* (1882), 52 L. J. Q. B. 22; 47 L. T. 19; and *Harston v. Harvey* (1884), 1 C. & E. 404.

In an action which it became necessary to bring against the old man's executors, it was held that this letter *amounted to a request* to his nephew to marry E. N., and that his promise therefore had a consideration, and was binding.

In sales consideration must be money.

In order for there to be a contract of *sale*, the consideration must consist wholly or in part (*k*) of *money* paid or promised (*l*). If goods be given in exchange for goods, it is a barter (*m*). So also goods may be given in consideration of work and labour done, or for rent, or for board and lodging (*n*) or any valuable consideration other than money, but they are not sales. The legal effects of such special contracts are generally, but not always, the same as in the case of sales (*o*); and the Sale of Goods Act, 1893, does not apply to them.

Bills of sale.

The consideration for bills of sale must be truly stated: see *post*, p. 289.

Consideration of bills and notes.

In the case of bills of exchange and promissory notes a consideration is presumed till the contrary is shown. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), deals with the consideration for a bill in the following sections:—

“ 27. (1.) Valuable consideration for a bill may be constituted by,—

- (a.) Any consideration sufficient to support a simple contract ;
- (b.) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2.) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who became parties prior to such time.

Bills of Exchange Act, 1882.

(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

“ 28. (1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

(*k*) *Sheldon v. Cox* (1824), 3 B. & C. 120; *Hands v. Burton* (1809), 9 East, 349; *Bull v. Parker* (1843), 7 Jur. 282; 12 L. J. Q. B. 93.

(*l*) Sect. 1 of Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*m*) *Harrison v. Luke* (1845), 14

M. & W. 139; 14 L. J. Ex. 248.

(*n*) *Keys v. Harwood* (1846), 2 C. B. 905; 15 L. J. C. P. 207.

(*o*) See *Emmanuel v. Dane* (1812), 3 Camp. 299; *La Neuville v. Nourse* (1813), 3 Camp. 351; *Benj. on Sale*, pp. 2, 3.

“ 29. (1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions : namely,

(a.) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact ;

(b.) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

“ 30. (1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course ; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.”

The cases of *Stott v. Fairlamb* (*p*), and *Currie v. Misa* (*q*), should be referred to with regard to an antecedent debt or liability as consideration for a promissory note. Where there exists a debt or liability *in presenti*, payable *in futuro*, and a state of things exists which entitles the debtor to make payment *at once*, the giving of a promissory note is a conditional payment, and is not without consideration.

Although, as has been said above, it is all very well in theory that it does not matter *what* the consideration is, provided there is one, yet, if the inadequacy is very striking indeed, the presumption of *fraud* arises, and a defendant may, on that ground, dispute his liability. The clown Whiteacre might have done this. As it was,

Inadequacy may suggest fraud.

(*p*) (1883), 49 L. T. 525 ; 53 L. J. Q. B. 47.

(*q*) (1875), L. R. 10 Ex. 153 ; 44 L. J. Ex. 94 ; affirmed 1 App. Cas. 554 ; 45 L. J. Q. B. 852.

he simply demurred to the declaration, and the issue of fraud was not raised.

Stranger
to con-
sideration.

A *stranger to the consideration* cannot sue upon a contract, although it may have been entered into expressly for his benefit, and he may be a near relation of the person from whom the consideration moved (*r*).

Failure of
considera-
tion.

Money paid away can sometimes be recovered back on the ground of *failure of consideration*, *e. g.*, money paid for the services of another which are performed so badly as to be quite useless to the employer(s); so, too, the buyer may recover the price paid to a seller who has impliedly warranted his title to the goods, when the goods prove to be stolen goods, which the buyer is compelled to restore to the true owner (*t*). But, unless the consideration be severable, and the price apportionable accordingly (*u*), the failure must be *total*, and not merely *partial*. A man not long ago apprenticed his son to a watchmaker, and paid a heavy premium. In a year's time the watchmaker died, but it was held that not a farthing of the premium could be recovered, because the lad had got a year's teaching out of the deceased, and therefore the failure of consideration was only *partial* (*x*).

Goods
which have
ceased to
exist.

The rule that when there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (*y*), has in some cases been treated as founded on the want of consideration for the purchaser's agreement to pay the price (*z*).

The subject of impossible contracts is treated of under *Taylor v. Caldwell*, *post*, p. 170.

(*r*) *Tweddle v. Atkinson* (1861), 1 B. & S. 393; 30 L. J. Q. B. 295; *Gandy v. Gandy* (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154.

(*s*) *Bostock v. Jardine* (1865), 3 H. & C. 700; 34 L. J. Ex. 142. But the buyer will not succeed on the ground of failure of consideration if the goods delivered are those which he intended to buy, although they may turn out to be worthless: *Lambert v. Heath* (1846), 15 M. & W. 486; 15 L. J. Ex. 297.

(*t*) *Eichholz v. Banister* (1864), 17 C. B. N. S. 708; 34 L. J. C. P. 105. This subject is fully treated in *Chitty on Contracts*, pp. 87—92.

(*u*) *Devaux v. Conolly* (1849), 8 C. B. 610; 19 L. J. C. P. 71.

(*x*) *Whineup v. Hughes* (1871), L. R. 6 C. P. 78; 40 L. J. C. P. 104; *Ferns v. Carr* (1885), 28 Ch. D. 409; 54 L. J. Ch. 478.

(*y*) Sect. 6 of the Sale of Goods Act, 1893 (56 & 57 Viet. c. 71).

(*z*) But see *Benj. on Sale*, pp. 81, 82.

*Past Consideration to support Promise must be moved
by previous Request.*

LAMPLEIGH v. BRATHWAIT. (1616)

[40.]

[HOB. 105.]

Brathwait, having committed a murder, requested Lampleigh to take certain journeys and use all his influence with a view to a pardon. After the journeys had been taken, and the services rendered, Brathwait promised, as a mark of his gratitude, to give his friend 100*l*. It was held that this promise was binding, notwithstanding that it had been made in consideration of services rendered in the past. The defendant *had requested* plaintiff to do what he had done, and therefore his doing it could not be looked upon as a mere voluntary courtesy.

Services rendered in the past, however great, are not generally a sufficient consideration to support a promise. If a plaintiff, suing on a warranty, were to say in his statement of claim that "in consideration that he (the plaintiff) *had bought* a horse of the defendant, the defendant promised that it was sound," such a pleading might be demurred to. No sufficient consideration would appear for the defendant's alleged promise (*a*). Past consideration.

But a past consideration will support a promise when it consists of services rendered by the plaintiff *at the defendant's request*.

This request (Brathwait's for instance) is generally *express*; the promisor has actually asked the promisee to do the service. But sometimes the law has to *imply the request*, *e.g.* :— Request.

1. *Where the plaintiff has been compelled to do what the defendant was legally bound to do.* Compulsion of promisee.

Not content with presuming that the defendant *requested* the plaintiff to settle for him, the law here goes on to presume that, in consideration of that settlement, the defendant *promised* the plaintiff to indemnify him. Both request and promise are implied.

(*a*) *Roscorla v. Thomas* (1812), 3 Q. B. 234; 2 G. & D. 508.

The acceptor of a bill of exchange must pay it when due; he is primarily liable on it. If he does not pay it, the holder may sue one of the indorsers and make *him* pay it. In such a case the law presumes that the acceptor asked the indorser to pay it, and presumes further that the acceptor subsequently promised to reimburse him (*b*). And whenever a surety is called on to pay his principal's debt, the law presumes (1) that the principal asked him to pay it, and (2) that he went on to promise indemnification. So, too, in a case where the plaintiff, a carrier, having by mistake delivered some goods to the defendant, who wrongfully appropriated them, was obliged to pay damages to the proper consignee, it was held that he could recover the amount against the appropriator (*c*). The receipt of the goods by the defendant must be considered to have been equivalent to his saying, "If you (the carrier) pay the true owner (as you may be compelled to do) for the goods, I will reimburse you" (*d*).

As to when a surety is justified in resisting payment on behalf of the debtor, the question seems to be, *What would a reasonable man have done under similar circumstances in a cause entirely his own?* Would he have defended the action or not? (*e*). "No person," said Lord Denman once, "has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action he cannot defend" (*f*).

A distinction is to be observed between compulsion by law and compulsion by agreement. If it was merely by agreement that the defendant was bound to do what the plaintiff has been compelled to do, the plaintiff must sue him on the special agreement, and not on implied *assumpsit*. Thus, in one case, a tenant by written agreement engaged to pay certain taxes which by statute were due from the landlord. The tenant made default, and the landlord, being obliged to pay, sued him for the amount as money paid to his use. But, as was pointed out by the Court, the plaintiff's payment had relieved the defendant from no liability but what arose from the contract between them. The taxes remained due by the default of the defendant, and this would give the plaintiff a remedy on the agreement, but the amount was paid by the plaintiff to one who had no claim upon the defendant, and therefore not to his use (*g*).

(*b*) *Pownal v. Ferrand* (1827), 6 B. & C. 439; 9 D. & R. 603; *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; 54 L. J. Q. B. 305.

(*c*) *Brown v. Hodgson* (1811), 4 Taunt. 189.

(*d*) See *per cur.* in *Spencer v.*

Parry, infra.

(*e*) *Tindall v. Bell* (1843), 11 M. & W. 228; 12 L. J. Ex. 161.

(*f*) *Short v. Kalloway* (1839), 11 A. & E. 28.

(*g*) *Spencer v. Parry* (1835), 3 A. & E. 331; 4 N. & M. 771.

2. *Where the promisee has voluntarily done what the promisor was legally compellable to do, and the latter in consideration thereof expressly promises.* Kindness of promisee.

Jones owes his tailor 50*l.*, and Brown, with the good nature for which he is proverbial, pays it for him, whereupon Jones promises to repay him the money. Here, it must be noticed, it is only the request that is implied (*h*).

3. *Where the promisor had adopted the benefit of the consideration.* Promisor taking benefit.

Here, too, both request and promise are presumed. If a tradesman sends me a quantity of things which I did not order, but have no objection to keep, the law presumes (1) that I asked him to send them, and (2) that I promised to pay for them. The maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* applies (*i*).

It may be noticed here that a *continuing* consideration, that is, one *executed in part but which still continues*, may also be sufficient to support a promise; *e.g.*, where the defendant, having become a tenant of the plaintiff, promised the plaintiff that he would, during the term of his tenancy, manage the farm demised to him in a husbandlike manner (*k*).

Moral Consideration insufficient.

BEAUMONT *v.* REEVE. (1846)

[41.]

[8 Q. B. 483; 15 L. J. Q. B. 141.]

In consideration of cohabitation during the preceding five years, a man promised to pay his late mistress an annuity of 60*l.* a year. In an action which the lady brought for arrears, it was held that there was *no legal consideration* for the promise.

(*h*) *Wing v. Mill* (1817), 1 B. & Ald. 104; *Paynter v. Williams* (1833), 1 C. & M. 810; 3 Tyr. 894.
(*i*) *Bird v. Brown*, 4 Ex. 798; 19 L. J. Ex. 154; *Eastwood v. Kenyon* (1810), 11 A. & E. 438; 3 P. & D. 276. See also *Ex parte Ford*

(1885), 16 Q. B. D. 305; 55 L. J. Q. B. 406.

(*k*) *Powley v. Walker* (1793), 5 T. R. 373; and *Massey v. Goodall* (1851), 17 Q. B. 310; 20 L. J. Q. B. 526.

Contract not illegal. It should be noticed that it was *not* because the contract was *illegal* that it was held to be void, but simply because there was *no consideration* for Reeve's promise; so that if the contract had been under seal (when considerations are unnecessary) it would have been binding on him. *Future* cohabitation, however, would be an *illegal* consideration, and would vitiate even a contract under seal (*l*).

Moral consideration when sufficient. But though a merely moral obligation will *not* support a promise, a moral obligation which *was once a legal one*, and would be so still but for the intervention of some statute or positive rule of law, *will* (*m*). A promise, for instance, to pay a debt barred by the Statute of Limitations is binding. A bankrupt, however, who has obtained his discharge cannot, except on a new consideration (*n*), make a binding promise to pay debts from which the Bankruptcy Acts have released him.

Father's liability. A parent, it may be mentioned, is not under any obligation, other than moral, to pay debts incurred by his child (*o*). Very slight circumstances, however, will raise a presumption of authority. "People are very apt to imagine," said Maule, J., once (*p*), "that a son stands in this respect upon the same footing as a wife. But this is not so. If it be asked, 'Is, then, the son to be left to starve?' the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support."

Barristers. A barrister's services as an advocate are supposed to be honorary, and therefore he can neither bring an action for his fees, nor make an express contract with his client in respect of them (*q*). But an express contract will be good when the strict relation of counsel and client does not exist between the contracting parties, *e.g.*, when a barrister acts as arbitrator or returning officer (*r*); and possibly an express contract with a client as to non-litigious business would be upheld.

Conveyancers and special pleaders may sue for their fees.

Medical practitioners. Medical practitioners may recover their fees, provided they prove upon the trial that they are registered. Their rights and duties are

(*l*) See *Pearce v. Brooks*, *post*, p. 141; and *Re Vallance*, *Vallance v. Blagden* (1884), 26 Ch. D. 353; 50 L. T. 574.

(*m*) See note to *Wennall v. Adney* (1802), 3 B. & P. 249.

(*n*) *Jakeman v. Cook* (1878), 4 Ex. Div. 26; 48 L. J. Ex. 165, distinguishing *Heather v. Webb* (1876), 2 C. P. D. 1; 46 L. J. C. P. 89. See also *Ex parte Barrow* (1881), 18 Ch. D. 464; 50 L. J. Ch. 821.

(*o*) *Mortimore v. Wright* (1840), 6 M. & W. 482.

(*p*) *Shelton v. Springett* (1851), 11 C. B. 452.

(*q*) *Kennedy v. Brown* (1863), 13 C. B. N. S. 677; 32 L. J. C. P. 137; *Robertson v. Maedonogh* (1880), 14 Cox, C. C. 469; *Swinfen v. Chelmsford* (1860), 5 H. & N. 890; 29 L. J. Ex. 382.

(*r*) *Egan v. Kensington Union* (1841), 3 Q. B. 935, n.

governed by the Medical Act, 1886 (49 & 50 Vict. c. 48), the Medical Act, 1858 (21 & 22 Vict. c. 90), and the Apothecaries Act, 1815 (55 Geo. III. c. 194). A registered practitioner cannot recover for the services of an unregistered assistant(s). The General Council of Medical Education have power to strike a practitioner off the register, and if they do so *bonâ fide*, and after due inquiry, there is no appeal (*t*).

The law regarding persons practising dentistry is contained in Dentists, the Dentists Act, 1878 (41 & 42 Vict. c. 33). As to chemists and chemists, druggists, see the Pharmacy Act, 1868 (31 & 32 Vict. c. 121); and as to veterinary surgeons, see the Veterinary Surgeons Act, 1881, veterinary surgeons. (44 & 45 Vict. c. 62).

(*s*) Howarth v. Brearley (1887),
19 Q. B. D. 303; 56 L. J. Q. B.
543.

(*t*) Allbutt v. General Council of
Medical Education (1889), 23 Q.
B. D. 400; 58 L. J. Q. B. 606.

REALITY OF CONSENT.

Recovery of Money Paid under Mistake, &c.

[42.]

MARRIOTT *v.* HAMPTON. (1797)

[7 T. R. 269; 2 ESP. 546.]

Hampton sold goods to Marriott. These Marriott duly paid for and obtained a receipt. By-and-by Hampton sent in his bill again. Marriott had a distinct recollection of having paid for the goods and said so. Hampton, however, challenged him to show a receipt, and though Marriott looked high and low for the document, it could not be found, and, as Hampton brought an action, he was obliged to pay over again.

But after a while the missing receipt was found, and Marriott now went to law with the tradesman to force him to repay the money. The reader will be grieved to hear that his efforts were not crowned with the success they deserved. Lawyers must live, of course; but *interest reipublicæ ut sit finis litium*, and there would be no end to litigation if everybody could have their cases tried over again when fresh evidence came to light.

*Ignorantia
facti
excusat.*

Money paid under a MISTAKE OF MATERIAL FACTS, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *Ignorantia facti excusat.* Two persons once agreed to dissolve partnership, and one of them paid to the other a sum of money for his share, on the footing of an investigation he had made of the partnership accounts. He after-

wards discovered that the profits were not so great as he had supposed them to be, so that he had paid too much for the share. This being a mistake of fact, it was held that, in spite of his carelessness in not having sufficiently looked into the matter, he could recover the sum paid in excess (*a*). And money so paid in ignorance may be recovered back, though the defendant cannot be put *in statu quo* (*b*). In a recent case it appeared that a man in Norfolk had by mistake paid to the Ecclesiastical Commissioners, who were owners of the tithes of the parish, tithe rent-charge in respect of lands not in his occupation. He did not discover his mistake till the two years limited by 6 & 7 Will. IV. c. 71, for the recovery of a tithe rent-charge had expired, and the Ecclesiastical Commissioners had consequently lost their remedy for the arrears against the lands actually chargeable. It was held, however, in an action brought by this man against the Commissioners, that he was not bound to find out his mistake within any particular time, and that, having found it out, he could recover the money (*c*). Moreover, money paid in *bonâ fide* forgetfulness of a fact once known to the plaintiff, under a "blind suspicion" of the facts, or in the hurry of business, can be got back (*d*).

Durrant v. Ecclesiastical Commissioners.

It is not, however, every seeming mistake of fact which will enable a party to recover money paid in ignorance. Where, for instance, bankers cash a customer's cheque, and then discover that they have no assets of his, they cannot recover the money back from the person to whom they have paid it (*e*). In such a case the bankers by a very moderate amount of inquiry might have ascertained that the cheque presented to them ought not to be honoured, and therefore there was really no mistake. "All the facts," said Williams, J., "are precisely as the cashier apprehended them.

Chambers v. Miller.

(*a*) *Townsend v. Crowdy* (1860), 8 C. B. N. S. 477; 29 L. J. C. P. 300; *Milnes v. Duncan* (1827), 6 B. & C. 671; 9 D. & R. 731; and *Lucas v. Worswick* (1833), 1 M. & Rob. 293.

(*b*) *Standish v. Ross* (1849), 3 Ex. 527; 19 L. J. Ex. 185.

(*c*) *Durrant v. Ecc. Comm.* (1880), 6 Q. B. D. 231; 50 L. J. Q. B. 30; distinguishing *Cocks v. Masterman* (1829), 9 B. & C. 902; 4 M. & R. 676. There is, however, some mistake in the report of this case, for the Tithe Act, 6 & 7 Will. IV. c. 71, did not limit the time within which tithe rent-charge might be recovered, but limited the amount recoverable to two years' arrears. See sects. 81 and 82. The Tithe Act of 1891, 54 Vict. c. 8, s. 10 (2), however, limits to two years the time within which proceedings must be commenced to recover tithe rent-charge, which first becomes payable subsequent to 26th March, 1891.

(*d*) *Kelly v. Solari* (1841), 9 M. & W. 54; 6 Jur. 107. See, however, *Barrow v. Isaacs*, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179.

(*e*) *Chambers v. Miller* (1862), 13 C. B. N. S. 125; 32 L. J. C. P. 301; *Aiken v. Short* (1856), 1 H. & N. 210; 35 L. J. Ex. 321; and see *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623; 40 L. J. Q. B. 233.

There is no mistake. It may be that if the cashier had at the time been aware of the state of the customer's account, he would not have paid the cheque. But if we were to go into all the remote considerations by which parties may be influenced, it would be opening a very wide field of conjecture, and would lead to infinite confusion and annoyance."

A contract based on a misapprehension of facts *by both parties* is void, and money paid under it may be recovered (*f*).

Mistake
as to per-
son one is
dealing
with.

A *mistake as to the person with whom he is dealing* will sometimes relieve a party from the necessity of performing his contract. Jones, who had been in the habit of dealing with Brocklehurst, a pipe-hose manufacturer, sent him an order for 50 feet of leather hose. It happened that that very day Brocklehurst had been bought out by his foreman, Boulton, who executed the order and sent the goods to Jones, without giving him notice that the goods were supplied by him and not by Brocklehurst. It was held that Boulton could not maintain an action against Jones for the price (*g*).

Relief in
equity.

The grounds for *equitable relief* in the case of mistakes of fact are "that mistake or ignorance of facts in parties is a proper subject of relief only where it either constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference" (*h*).

*Ignorantia
legis non
excusat.*

Money paid with a knowledge of all the facts but under a MISTAKE OF THE LAW, *i. e.*, of a general rule of law, or, like Mr. Marriott, by compulsion of legal proceedings, cannot, in general, be recovered back, there being nothing against conscience in the other retaining it. *Ignorantia juris non excusat.* A ship captain brought home in his ship a quantity of treasure, and, when he got to England, paid over a certain portion of it to the admiral under whose convoy he had sailed; not, if you please, in a spirit of

Tipping
the
Admiral.

(*f*) *Cochrane v. Willis* (1865), L. R. 1 Ch. 58; 35 L. J. Ch. 36.

(*g*) *Boulton v. Jones* (1857), 2 H. & N. 564; 27 L. J. Ex. 1117; followed in the American case of *Boston Ice Company v. Potter* (1877), 123 Mass. 28; see also *Mitchell v. Lapage* (1816), Holt,

N. P. 253; *Humble v. Hunter* (1848), 12 Q. B. 310; 17 L. J. Q. B. 350; and *Smith v. Wheatcroft* (1878), 9 Ch. D. 223; 47 L. J. Ch. 745.

(*h*) *Snell's Equity*, 11th ed. p. 460.

gratitude, but *believing that he was bound by law to pay it*. But he wasn't; and, when he found that out, he brought an action to try and get it back again. But it was held that he could not get it back again, for he had gone wrong in his *law*, not in his facts (*i*).

"*Every man*," said Lord Ellenborough, in *Bilbie v. Lumley* (*k*) (where an underwriter tried to get back some money he had paid as for a loss, saying he had not understood the legal effect of a particular document), "*must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.*" Everybody knows the law.

In *Miles v. Scotting* (*l*), it was held by Stephen, J., that the doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even though the person receiving the payment be one of the persons authorizing it to be made.

The recent case of *Moore v. Fulham Vestry* (*m*) contains an important decision on this subject. The facts were, that the defendants had issued a summons against the plaintiff to recover his proportion of certain street improvement expenses alleged to be due from him as the owner of premises abutting on a street in the defendants' district; the plaintiff paid the money *before the summons was heard*, and the summons was withdrawn. The plaintiff having subsequently discovered that his premises did not abut on the street in question, sued the defendants for a return of the money; but it was held that the money had been paid under pressure of legal process, and that, notwithstanding the withdrawal of the summons, it was not recoverable.

It is to be observed, however, that to make money paid under compulsion of legal proceedings irrecoverable, the proceedings must be regular, and not a mere cloak for extortion. A person named Collins, who was quite insolvent, had the impudence to arrest a continental duke for an imaginary debt of £10,000. The continental duke was incontinently frightened—probably he had heard that debtors in England were always ordered off to instant execution—and paid £500 for his release. He afterwards brought an action to recover the money, and was held entitled to do so (*n*). "It is clear," said Coleridge, J., "that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear, too, that if there be a *bonâ fide* legal process, under which money is

Abuse of legal process.

(*i*) *Brisbane v. Dacres* (1813), 5 Taunt. 143; and see *Barber v. Pott* (1859), 4 H. & N. 759; 28 L. J. Ex. 381; and *Rogers v. Ingham* (1876), 3 Ch. Div. 351; 46 L. J. Ch. 322.

(*k*) (1802), 2 East, 469.

(*l*) (1885), 1 C. & E. 491.

(*m*) [1895] 1 Q. B. 399; 64 L. J. Q. B. 226.

(*n*) *Cadaval v. Collins* (1836), 4 A. & E. 858; 2 H. & W. 54.

recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation. That is the substance of the decisions. But no case has decided that, *when a fraudulent use has been made of legal process*, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law."

So, resting on the ground of a presumption that there must have been fraud or undue influence of some kind, there is a well known doctrine of equity that if a person, acting in ignorance of a *clear and elementary principle of law*, parts with a portion of his property, he will be relieved from the consequences of his mistake. Thus, in *Landsdowne v. Landsdowne* (*o*), an uncle having a difference of opinion with the son of his elder brother as to the right to inherit an estate, they both agreed to go by the decision of the schoolmaster. That worthy person, acting on the maxim that "*land cannot ascend, but always descends*," pronounced in favour of the uncle; but it was held that, the mistake being so great as to suggest fraud, the nephew was entitled to relief. Where, however, the mistake arises on a doubtful point of law, a fair compromise will be upheld; and it is on this ground that the whole doctrine of the validity of family compromises of doubtful rights rests. But in such cases there must be a full communication of all the material circumstances known (*p*).

Lands-
downe v.
Lands-
downe.

Officers of
the Court.

Where, however, assets have come into the hands of an officer of the Court, as, for instance, a trustee in bankruptcy or official liquidator, under a mistake of law, the Court will compel its officer to repay the money (*q*).

Other
cases.

The following cases may also be referred to on the subject-matter of this note:—*Foster v. Mackinnon* (1869), L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Hunter v. Walters* (1871), L. R. 7 Ch. 75; 41 L. J. Ch. 175; *Freeman v. Jeffries* (1869), L. R. 4 Ex. 189; 38 L. J. Ex. 116; *Turner v. Turner* (1880), 14 Ch. D. 829; and *Green v. Duckett* (1883), 11 Q. B. D. 275; 52 L. J. Q. B. 435.

(*o*) 2 Jac. & Walker, 205.

(*p*) *Gordon v. Gordon* (1819), 3 Swanst. at p. 463.

(*q*) See *Ex parte James* (1874), L. R. 9 Ch. 609; 43 L. J. Bk. 107; *Ex parte Simmonds* (1885), 16 Q. B.

D. 308; 55 L. J. Q. B. 74; *In re Brown* (1886), 32 Ch. D. 597; 55 L. J. Ch. 556; and *In re Opera, Limited*, [1891] 2 Ch. 151; 60 L. J. Ch. 464.

LEGALITY OF OBJECT.

Contracts Contrary to Public Policy.

EGERTON *v.* BROWNLOW. (1853)

[43.]

[4 H. L. CAS. 1 ; 23 L. J. CH. 348.]

The seventh Earl of Bridgewater was anxious that after his death some member of his family should become a duke, and with that great object in view he sat down and made his will. He left large estates to Lord Alford and his heirs, but expressly provided that, if Lord Alford died without being made a duke, they should go over. Lord Alford was *not* made a duke, but it was held nevertheless that the estates did *not* go over, as the condition subsequent which the earl had imposed was contrary to public policy and void.

“May I not do what I will with mine own?” Why, certainly; but perhaps you will have the kindness to tell us what *is* your own. No man, according to our law, is the *owner* of *land*. At the most he is *tenant* in fee simple; the *ownership* residing all the time in the Crown, that is, in the State. As to *personal property*, the law recognises a *quasi-ownership*. In other words, it *protects* a man in the enjoyment of it. But, of course, an Act of Parliament can take away all those safeguards which are thrown round the enjoyment of property, whether real or personal; and when the interests of the State and the interests of individuals happen to clash, *public policy* (that is, “the public good recognised and protected by the most general maxims of the law and the constitution”) requires that the former shall prevail.

EGERTON *v.* BROWNLOW is an important case on this “public policy.” It was considered that the condition violated it because it would be

No true ownership of land.

Principle of leading case.

“mischievous to the community at large that every branch of the public service should be besieged by persons who at the peril of losing their estates were making every effort to obtain offices for which they might be unfit, and to procure titles and distinctions of which they might be unworthy,” and because the common law hates capricious conditions.

Maxims.

It is to be observed that, in dealing with cases of this kind, the Courts are not distributing a kind of equity differing with the length of each judge's foot, but are acting on certain well-known principles and maxims, such as *Salus populi suprema lex*, *Nihil quod est inconveniens est licitum*, *Sic utere tuo ut alienum non laedas*, &c. The tendency of modern decisions is, however, to limit the sphere within which the Courts will set aside contracts on the ground that they contravene public policy, for, as was said by Sir George Jessel in the case of *Printing Co. v. Sampson* (a), “You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract.” And in the recent case of *Tullis v. Jaeson* (b), it was held that a clause in a building contract, providing that the valuations, certificates, orders, and awards of the arbitrator appointed thereunder should be final and binding, and should not be set aside for any pretence, charge, suggestion, or insinuation of fraud, collusion, or confederacy, was not obnoxious to public policy, for, in the absence of fraud on the part of the parties to the contract, it was competent to them to agree not to raise any question of fraud in the arbitrator.

Tullis v.
Jaeson.

“Public policy,” once said Burroughs, J., “is a restive horse, and when once you get astride of it there is no knowing where it will carry you.”

“You vote
for my
man, and
I'll vote
for yours.”

Reference may with advantage be made to the two following cases on public policy. In one of them (c), the plaintiff and defendant were both subscribers to a certain charity, the objects of which were elected by the subscribers with votes proportioned to the amount subscribed. The defendant on one occasion was anxious that a particular person should be elected; so, to compass his object, he agreed with the plaintiff that, *if the latter would give twenty-eight votes for the candidate at this election, he (the defendant) would at the next election give twenty-eight votes for anybody the plaintiff wished*. Accordingly, the plaintiff voted for the defendant's candidate; but, when the next election came round, the defendant refused to furnish the twenty-eight votes he had promised, and the plaintiff

(a) (1875), L. R. 19 Eq. 462; 44 L. J. Ch. 705.

(b) [1892] 3 Ch. 441; 61 L. J. Ch. 655.

(c) *Bolton v. Madden* (1873), L. R. 9 Q. B. 55; 43 L. J. Q. B. 35.

in consequence subscribed £7 7s. to the charity so as to obtain twenty-eight more votes in his own right. In an action for the money thus paid, it was urged by the defendant that the agreement was void as against public policy. "The argument for the defendant," said Blackburn, J., "was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff, if he gave his votes at the first election to what he thought the best candidate, incurred neither trouble nor prejudice, so that there was in that point of view no consideration; and if he gave his votes to the candidate whom he did not think the best, the whole agreement was void as against public policy. But though some of us, at least, much disapprove of this kind of traffic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power."

In the other case (*d*), the plaintiff had seduced a man's wife, and had then entered into an agreement with the husband that, if the latter would keep the affair secret, the former would not enforce payment of a certain bond. The husband died; and, thinking perhaps that the secret had died with him, the plaintiff sued on the bond. In answer to the claim, the executor pleaded the agreement; but the plea was held bad, on the ground that there was no valid consideration for the plaintiff's promise. Keeping it secret.

Other subjects illustrating public policy are *bribery*; *champerty and maintenance*; *sale of offices*; *insurance of seamen's wages*; *trading with enemies*; and *assignment of salaries*; and reference may usefully be made to the following, amongst other, cases:—*Coppock v. Bower* (1838), 4 M. & W. 361 (a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition. Held, that this agreement was illegal); *Ball v. Warwick* (1881), 44 L. T. 218; 50 L. J. Q. B. 382 (champerty—loan to be repaid by the result of litigation); *Keir v. Leeman* (1846), 9 Q. B. 371; 15 L. J. Q. B. 360 (agreement to stifle prosecution illegal); *Potts v. Bell* (1800), 8 T. R. 548; 2 Esp. 612 (trading with an enemy illegal); *Stanley v. Jones* (1831), 7 Bing. 369 (an agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence by procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, is illegal);

(*d*) *Brown v. Brine* (1875), 1 Ex. Div. 5; 45 L. J. Ex. 129.

Bradlaugh v. Newdegate (1883), 11 Q. B. D. 1; 52 L. J. Q. B. 454 (maintenance); *Plating Co. v. Farquharson* (1881), 17 Ch. D. 49; 50 L. J. Ch. 406 (contempt of court—advertisement for subscriptions to defend a pending suit and offering a reward for evidence—common interest); *Harris v. Brisco* (1886), 17 Q. B. D. 504; 55 L. J. Q. B. 423 (maintenance—defendant acting “from charitable motives” in assisting third person is a good defence, although he acted without inquiry into the circumstances); *Lound v. Grimwade* (1888), 39 Ch. D. 605; 57 L. J. Ch. 725 (contract tending to affect the course of criminal proceedings); and *In re Mirams*, [1891] 1 Q. B. 594; 60 L. J. Q. B. 397 (assignment of salary of public office); *Alabaster v. Harness*, [1895] 1 Q. B. 339; 64 L. J. Q. B. 76 (maintenance—what amounts to a “common interest” sufficient to justify).

Illegal Contracts.

[44.]

COLLINS *v.* BLANTERN. (1767)

[2 WILS. 341.]

This was an action on a bond which was intended to secure to the plaintiff the repayment of a sum of £350. But the fact was that the plaintiff had advanced the money for the purpose of settling a criminal prosecution, and it was therefore successfully pleaded that *the consideration for the bond was illegal*, and, although it did not appear on the face of the deed, vitiated it.

Said Lord Chief Justice Wilmot, in memorable words, “You shall not stipulate for iniquity. All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in

this unclean manner to recover it back. *Procul O! procul este profani!*"

A deed is of so solemn a nature that whatever a man therein asserts he is estopped from afterwards denying. On the other hand, "the pure fountains of justice" must not be polluted; and so we get engrafted on our rule the exception that *illegality is fatal, not only to an ordinary agreement, but even to a deed.*

Deed vitiated by illegality. Several promises, some illegal, some not.

It may happen, however, that the legal part of an agreement can be separated from the illegal. This can never be the case where one of several *considerations* is illegal, because it cannot be known which of them induced the promise. But when the consideration is not illegal, and there are several promises, some of which are illegal, and others not, the agreement is void only if the illegal promises are incapable of being separated from the legal.

Illegal contracts are generally divided into two classes:—

- (1.) Those illegal by the common law.
- (2.) Those illegal by statute.

Under the former head come contracts in restraint of marriage or trade, contracts impeding the administration of justice, immoral contracts, and the like. Under the latter head may be mentioned Sabbath-breaking and gaming contracts, and also contracts under the Truck Acts (*e*). To make a contract void, the statute need not use express words of prohibition; if it inflicts a penalty, it may be sufficient (*f*). If, however, the object of the statute is *not to prohibit the act done, but only to impose a penalty for the purpose of the revenue*, the contract will not be illegal (*g*). Thus, it was held in the recent case of *Learoyd v. Bracken* (*h*), that a broker who had made purchases and sales on the Stock Exchange for his principal was not prevented from recovering commission on such purchases and sales by an omission on his part to transmit to his principal any stamped contract notes in conformity with the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), sect. 17, sub-sect. 1 (*i*).

Common law illegality. Statutory illegality.

Penalty implies prohibition.

(*e*) See 1 & 2 Will. IV. c. 37; and 50 & 51 Vict. c. 46. And see the recent cases of *Lamb v. G. N. Ry. Co.* [1891] 2 Q. B. 281; 60 L. J. Q. B. 489; *Hewlett v. Allen*, [1892] 2 Q. B. 662; 62 L. J. Q. B. 9.

(*f*) *Cope v. Rowlands* (1836), 2 Gale, 231; 2 M. & W. 119; *Bensley v. Bignold* (1822), 5 B. & Ald. 335; and *Cundell v. Dawson* (1847), 4 C. B. 376; 17 L. J. C. P. 311; *Melliss v. Shirley Local Board*

(1885), 16 Q. B. D. 446; 54 L. J. Q. B. 408.

(*g*) *Smith v. Mawhood* (1845), 14 M. & W. 452; 15 L. J. Ex. 119; *Smith v. Wood* (1889), 24 Q. B. D. 23; 37 W. R. 800.

(*h*) [1891] 1 Q. B. 114; 63 L. J. Q. B. 96.

(*i*) But see now the Stamp Act, 1891 (54 & 55 Vict. c. 39), sects. 52, 53, which consolidates the previous statutes.

Agree-
ment to
stifle pro-
secution.

Though an agreement to stifle a public prosecution is illegal, in such cases the intention to impede the administration of justice must be clearly proved. In the case of *Flower v. Sadler* (*k*) it was held, that in order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to know that the creditor was thereby induced to abstain from prosecuting.

The recent case of *Windhill Local Board v. Vint* (*l*), decided that an agreement by the defendants at a trial to abate an indictable nuisance (the obstruction of a highway) within a certain time, in consideration of the prosecutors consenting to a verdict of Not Guilty, cannot be enforced, because it was founded on an illegal consideration.

Another illustration of an illegal contract is afforded by the case of *Scott v. Brown* (*m*). It was there held that an agreement between two or more persons to induce would-be buyers of shares in a company, contrary to the fact, to believe that there was a market for the shares, and that the shares were of greater value than they really were, was illegal, and that no action could be maintained in respect of such agreement or purchase of shares.

Infection.

A contract perfectly good and legal in itself may become bad and illegal by being connected with a previous illegal contract. A man once brought an action on a covenant for payment of money. But the defendant set up the defence that a contract had been formerly entered into between himself and the plaintiff, by the terms of which the plaintiff was to sell him some land for the illegal purpose of being sold by lottery; and he said that the deed on which the plaintiff was now suing him was a security for the purchase-money of that land. The judges considered that this plea was an answer to the plaintiff's claim. "It is clear," they said, "that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement, and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which by the original bargain was tainted with illegality (*n*).

(*k*) (1882), 10 Q. B. D. 572, following *Ward v. Lloyd* (1843), 7 Scott, N. R. 499; 6 Man. & G. 785; and see *Rourke v. Mealy* (1879), 41 L. T. 168; 4 L. R. Ir. 166.

(*l*) (1890), 45 Ch. D. 351; 59 L. J. Ch. 608. See also *Jones v. Merionethshire Building Society*, [1892] 1 Ch. 173; 61 L. J. Ch. 138.

(*m*) [1892] 2 Q. B. 724; 61 L. J. Q. B. 738.

(*n*) *Fisher v. Bridges* (1854), 24 L. J. Q. B. 165; 3 E. & B. 642; and see *Jennings v. Hammond* (1882), 9 Q. B. D. 225; 51 L. J. Q. B. 493; *Shaw v. Benson* (1883), 11 Q. B. D. 563; 52 L. J. Q. B. 575; *Ex parte Poppleton* (1884), 14 Q. B. D. 379; 54 L. J. Q. B. 336.

Money paid for an illegal purpose may be recovered back any time before the illegal purpose has been carried out (*o*); but not afterwards, because then the parties are *in pari delicto*, and the maxim *melior est conditio possidentis* applies. "The true test," it was said in a case where a man tried unsuccessfully to get back a bank-note he had given a brothel-house keeper as a security for a debt for wines and suppers at the brothel (*p*), "for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." So in *Simpson v. Bloss* (*q*) the plaintiff had bet 25 guineas with a Captain Brograve that a mare named Glaucina would win the Epsom Stakes, and the defendant agreed to contribute to the extent of 10 guineas. Glaucina won, and, in the expectation of getting the whole 25 guineas from the Captain, the plaintiff paid the defendant his 10 guineas. Unfortunately, Brograve immediately afterwards died, and the plaintiff never received the money. It was held that he was not entitled to recover the 10 guineas he had prematurely paid away, because his claim to do so was too much mixed up with the illegal transaction in which he and the defendant and Brograve had been jointly engaged. So in *Kearley v. Thomson* (*r*) it was held that money paid to the solicitors of a petitioning creditor to induce them not to appear at the public examination of a bankrupt and oppose his discharge, cannot be recovered, although the contract is illegal, if there has been part performance of the contract.

Recovering money paid for illegal purpose.

Glaucina and the Epsom Stakes.

Kearley v. Thomson.

When it is doubtful whether a contract is legal or illegal, the presumption of law is in favour of its being legal (*s*).

Closely connected with the present subject is the doctrine of *ultra vires*. That is the name given to those contracts which, being beyond the purposes of its existence, a corporation has no power to make, and which are therefore void. Thus, it has been held *ultra vires* for a railway company to work coal mines (*t*), to trade with a line of steamers to a foreign port (*u*), or to take land merely for the

Ultra vires.

(*o*) *Taylor v. Bowers* (1876), 1 Q. B. D. 291; 45 L. J. Q. B. 163; and *Wilson v. Stragnell* (1881), 7 Q. B. D. 548; 50 L. J. M. C. 145. But see *Herman v. Jeuchner* (1885), 15 Q. B. D. 561; 54 L. J. Q. B. 340.

(*p*) *Taylor v. Chester*, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225; and *Herman v. Jeuchner*, *ubi sup.*

(*q*) (1816), 7 Taunt. 246.

(*r*) (1890), 21 Q. B. D. 742; 59

L. J. Q. B. 288.

(*s*) *Lewis v. Davison* (1839), 4 M. & W. 654; 1 H. & H. 425; *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q. B. D. 387; 58 L. T. 460.

(*t*) *Eccles. Comm. v. N. E. Ry. Co.* (1877), 4 Ch. Div. 845; 47 L. J. Ch. 20.

(*u*) *Colman v. Eastern Counties Ry. Co.* (1846), 10 Beav. 1; 16 L. J. Ch. 73.

Ashbury
Railway
Carriage
Co. v.
Riche.

purpose of selling it again at a profit (*x*). A leading case on *ultra vires* is Ashbury Railway Carriage Co. v. Riche (*y*), where the directors of a company, whose objects, as stated in the Memorandum of Association, were chiefly (though not altogether) confined to making and dealing in railway plant, agreed to purchase a concession for making a railway in a foreign country. "A statutory corporation," said Lord Selborne in that case, "created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined in that Act. The present, and all other companies incorporated by virtue of the Companies Act of 1862, appear to me to be statutory corporations within this principle. The Memorandum of Association is under that Act their fundamental and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum." But in the later case of Attorney-General v. Great Eastern Railway Company (*z*), where it was held not *ultra vires* for one railway company to agree to supply another with rolling stock, it was said that, while the doctrine of *ultra vires* as explained in Ashbury Railway Carriage Co. v. Riche is to be maintained, it is to be applied reasonably, so that whatever is fairly incidental to those things which the Legislature has authorized by an Act of Parliament ought not (unless expressly prohibited) to be held as *ultra vires*. So, in a case decided about the same time as that just referred to, it has been held that the directors of a joint stock bank, the deed of which gives them extensive powers to carry on the business of bankers, and to act as may appear to them best calculated to promote the interest of the bank, have power, when the formation of another company is of importance to the bank, to guarantee the payment of interest on debentures of that company issued for the purpose of forming it (*a*). So, too, the directors of a company may be justified under their general powers of management in giving gratuities to their workmen as a reward for, or incentive to, extra exertion (*b*).

The cases of The Yorkshire Railway Waggon Co. v. Maclure (*c*) and Blackburn Building Society v. Cunliffe, Brooks & Co. (*d*), may also be referred to on this subject.

(*x*) Carington v. Wycombe Ry. Co. (1868), L. R. 3 Ch. 377; 18 L. T. 96.

(*y*) (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185; and see Baroness Wenlock v. River Dee Co. (1885), 10 App. Ca. 354; 54 L. J. Q. B. 577.

(*z*) (1880), 5 App. Ca. 473; 49 L. J. Ch. 545.

(*a*) *In re* West of England Bank (1880), 14 Ch. Div. 317; 49 L. J. Ch. 400.

(*b*) *Hampson v. Price's Candle Co.* (1876), 45 L. J. Ch. 437; 34 L. T. 711.

(*c*) (1882), 21 Ch. D. 309; 51 L. J. Ch. 857.

(*d*) (1882), 22 Ch. D. 61; 31 W. R. 98.

The Att.-
Gen. v.
The
G. E. R.
Co.

Immorality.

PEARCE v. BROOKS. (1866)

[45.]

[L. R. 1 Ex. 213; 35 L. J. Ex. 134.]

A coach-builder who knows a woman to be a prostitute cannot recover for the price of a miniature brougham which he lets her have on credit, and which he is well aware she is going to use as part of her display to attract men.

In deciding this case the Court followed *Cannan v. Bryce* (*e*), where it was held that money lent and applied by the borrower for the purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, could not be recovered back by him. *Cannan v. Bryce.*

There is a case of *Lloyd v. Johnson* (*f*), which may be thought to some extent to conflict with the leading case. The action was brought by a laundress against a woman of the town for the washing of a variety of dresses and some gentlemen's nightcaps, the plaintiff being well aware of the use to which the latter were put. It was held, nevertheless, that the plaintiff was entitled to recover. "This unfortunate woman," said Buller, J., "must have clean linen; and it is impossible for the Court to take into consideration which of these articles were used for an improper purpose and which were not." *Lloyd v. Johnson.*

To defeat the plaintiff's claim in an action of this kind, when he knew the purpose his goods were going to be put to, it is not necessary to show that he looked expressly to the profits of the prostitution for payment.

A recent case in Ireland (*g*) well shows how severely the law regards this kind of immorality. The action was by a servant girl against a man who had had carnal knowledge of her with her consent, but without her knowing that he had got a bad venereal disease. This disease he communicated to her. In an action as for an assault, it was held that, arising as it did *ex turpi causâ*, it could not be maintained. It is not obvious, however, how this decision can be reconciled with the cases of *Reg. v. Bennett* (*h*) and *Reg. v.* *Ex turpi causâ non oritur actio.*

(*e*) (1819), 3 B. & Ald. 179.(*f*) (1798), 1 B. & P. 310.(*g*) *Hegarty v. Shine* (1878), 4 L. R. Ir. 288; 14 Cox, C. C. 145.(*h*) (1865), 4 F. & F. 1105.

Sinclair (*i*), where, under similar circumstances, it was held that the man might be convicted of an indecent assault, or of inflicting actual bodily harm, on the principle that fraud vitiates consent. But the judgment of Fitzgerald, J., even though erroneous in law, will well repay perusal. These two cases, however, were considered and practically overruled in the recent case of *The Queen v. Clarence* (*k*), where, in a Court of Crown Cases Reserved, consisting of thirteen judges, it was decided by Lord Coleridge, C. J., Pollock and Huddleston, BB., Stephen, Manisty, Mathew, A. L. Smith, Wills, and Grantham, JJ. (Field, Hawkins, Day, and Charles, JJ., dissenting), that a man cannot be convicted of unlawfully and maliciously inflicting grievous bodily harm, or of an assault occasioning actual bodily harm, who, at a time when he knew, but his wife did not know, that he was suffering from gonorrhœa, had connection with her with the result that the disease was communicated to her, although she would not have submitted to the intercourse had she been aware of his condition.

The Queen
v. Clarence.

“The
Memoirs
of Har-
riette
Wilson.”

Obscene
carica-
tures.

The principles above stated apply equally to all contracts having an immoral tendency. In *Poplett v. Stockdale* (*l*), it was held that the printer of an immoral and libellous work called the “Memoirs of Harriette Wilson” could not maintain an action for his bill against the publisher who employed him. “Everyone,” said Best, C. J., “who gives his aid to such a work, though as a servant, is responsible for the mischief of it.” In *Fores v. Johnes* (*m*), the defendant had told the plaintiff, a printseller in Piccadilly, to send him “all the caricature prints that had ever been published.” The plaintiff accordingly sent a large quantity, but the defendant refused to receive them, on the ground that the collection contained several prints of obscene and immoral subjects. “For prints,” said Lawrence, J., “whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel.”

(*i*) (1867), 13 Cox, 28.

(*k*) (1888), 22 Q. B. D. 23; 16 Cox, C. C. 511.

(*l*) (1825), R. & M. 337; 2 C. & P. 198.

(*m*) (1802), 4 Esp. 96.

Contracts Impeding Administration of the Law.

SCOTT v. AVERY. (1855)

[46.]

[5 H. L. C. 811; 25 L. J. Ex. 303.]

This was an action by a gentleman whose ship had gone to the mermaids against a Newcastle Insurance Association of which both plaintiff and defendants were members. The defendants relied on one of the rules of their association (which the plaintiff as a member had, of course, bound himself to observe) providing that no member should bring an action on a policy till certain arbitrators had ascertained the amount that ought to be paid. In answer to that objection, the plaintiff contended that an agreement which ousts the superior Courts of their jurisdiction is illegal and void, and that the rule relied on by the defendants was of such a nature.

This view, however, did not prevail. Judgment was given for the defendants on the ground that the contract *did not oust the superior Courts of their jurisdiction, but only rendered it a condition precedent to an action that the amount to be recovered should be first ascertained by the persons specified.*

By the common law an agreement between private parties to refer disputes to arbitration, to the exclusion of the jurisdiction of the ordinary Courts, is, generally speaking, inoperative, as being voidable on grounds of public policy. But although, as a rule, such an agreement will not avail to oust the Courts of their jurisdiction, and so to prevent an injured party from seeking redress in the ordinary way, yet it is so far valid that an action may be successfully maintained for the breach of it. The practical effect of the common law rule is not, however, very considerable, inasmuch as the Legislature has virtually rendered such an agreement capable of being enforced. It is provided by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), repealing and replacing the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), that a submission is irrevocable, unless a

General rule.

Action for breach.

Arbitration Act, 1889.

No arbitration where fraud charged.

contrary intention is expressed, except by leave of the Court; and where there is a submission to arbitration, and any party commences an action, any party to such legal proceedings may apply to the Court to stay such proceedings, which stay will be granted if the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission (*n*). And, as may well be supposed, the discretion thus given to the Court is usually exercised to compel the reference to arbitration, except in the presence of special circumstance which would render such compulsion inequitable. Thus, in a case (*o*) where fraud is charged, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But when the objection to arbitration is raised by the party charging the fraud, the Court will not necessarily accede to it, and, indeed, will never do so unless a *prima facie* case of fraud is proved.

Architect's certificate condition precedent.

We have, too, seen from the leading case that, although a contract to refer is in general voidable, it is quite open to the parties to impose a condition precedent to the right of action; as, for example, that the amount of damages shall be ascertained by arbitration, or, as in the case of an ordinary building contract, that the builder is only to be paid if the architect or engineer certifies that the work has been properly done. When such a condition precedent is imposed by the agreement of the parties, no action, of course, lies until the condition upon which it may be brought has been duly performed (*p*). A good illustration of this principle is to be found in the recent case of *Caledonian Insurance Co. v. Gilmour* (*q*). There, a policy of fire insurance provided that any difference as to the amount payable under it in respect of any alleged loss or damage by fire should be referred to arbitration, and that

Caledonian Insce. Co. v. Gilmour.

(*n*) *Farrar v. Cooper* (1890), 44 Ch. D. 323; 59 L. J. Ch. 506; *Turncock v. Sartoris* (1890), 43 Ch. D. 150; 62 L. T. 209; *In re Carlisle* (1890), 44 Ch. D. 200; 59 L. J. Ch. 520; *In re Smith & Service* (1890), 25 Q. B. D. 545; 59 L. J. Q. B. 533. See also *Knight v. Coales* (1887), 19 Q. B. D. 296; 56 L. J. Q. B. 486; *Lyon v. Johnson* (1889), 40 Ch. D. 579; 58 L. J. Ch. 626; *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238; 68 L. T. 472; and *Belfield v. Bourne*, [1894] 1 Ch. 521; 63 L. J. Ch. 104. As to the jurisdiction of the Court to review the findings of an arbitrator, see *Darlington Waggon Co. v. Harding*, [1891] 1 Q. B. 245; 60

L. J. Q. B. 110; and *In re Whiteley & Roberts' Arbitration*, [1891] 1 Ch. 558; 60 L. J. Ch. 149.

(*o*) *Russell v. Russell* (1880), 14 Ch. D. 471; 49 L. J. Ch. 268; *Davis v. Starr* (1889), 41 Ch. D. 242; 58 L. J. Ch. 808.

(*p*) *Edwards v. Aberayon Mut. Ship. Ins. Co.* (1876), 1 Q. B. D. 563; 44 L. J. Q. B. 67; *Collins v. Locke* (1879), 4 App. Cas. 674; 48 L. J. P. C. 68; *Viney v. Bignold* (1887), 20 Q. B. D. 172; 57 L. J. Q. B. 82.

(*q*) [1893] A. C. 85; 1 R. 110. See also *Trainor v. Phoenix Fire Assurance Co.* (1892), 65 L. T. 825; and *Scott v. Mercantile Accident Insurance Co.* (1892), 66 L. T. 811.

“ the obtaining of such award shall be a condition precedent to the commencement of any action upon the policy ” ; and it was held, that the obtaining an award was a condition precedent to a right of action by the insured.

The extent of the decision in *Scott v. Avery* may be well illustrated by comparing the two cases of *Dawson v. Fitzgerald* (r) and *Babbage v. Coulburn* (s). In the former, a lessee had covenanted with his lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops, he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to arbitration. The lessor having brought an action for breach of covenant, it was held *that the covenant to refer the amount of compensation was a collateral and distinct covenant from that to pay for the damage done, and, therefore, that the action was maintainable although there had been no arbitration.*

Dawson v. Fitzgerald.

We see, then, that the lessor might sue on the covenant to pay compensation, leaving the lessee to pursue one of two courses—either to bring an action for not referring, or to apply under the Act to have the proceedings stayed. If, however, the Court had come to the conclusion that, on the true construction of the agreement, it amounted only to a simple covenant to *pay such damages as should be ascertained by an arbitrator*, no action would have lain till he had so ascertained them. And now let us compare with this decision the recent case of *Babbage v. Coulburn*. There, by a written agreement, the tenant of a furnished house agreed at the expiration of the term to deliver up possession of the house and furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment, if disputed, to be settled by arbitration. It was held that the settlement of this amount by arbitration was a condition precedent to the right of the landlord to bring an action in respect of the dilapidations. As was observed by Huddleston, B., “ The question in all these cases is whether or not there are separate and independent covenants: a covenant that an act shall or shall not be done, and a covenant to refer. Here the defendant agreed to deliver up the furniture in a certain condition, and agreed, not independently to refer, but to deliver up the furniture and pay any sum awarded by the valuers.”

Babbage v. Coulburn.

It must be observed that in many cases the real question between the parties to an agreement containing an arbitration clause is whether the matter in dispute is within or without the terms of this

(r) (1876), 1 Ex. D. 257; 45 L. J. Ex. 893.

(s) (1882), 9 Q. B. D. 235; 51 L. J. Q. B. 638.

clause. This generally is a question for the arbitrator himself, and not for the Court. In an application on a summons for compulsory reference under the provisions of the Common Law Procedure Act, Lord Selborne observed (*t*): “It struck me throughout that the endeavour of the appellants has been to require this Court to do the very thing which the arbitrators ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside the agreement.”

Friendly
Societies,
&c.

The Legislature has, for public purposes, established certain exceptions to the general rule that agreements between private parties cannot oust the jurisdiction of the Courts, and has, in some instances, made arbitration obligatory by Act of Parliament. The most notable examples are the statutory provisions for reference to arbitration in the case of friendly and building societies (*u*), and the compulsory references under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59). Some statutes provide that certain disputes shall be settled by arbitration, and give the Court power to stay proceedings in an action, “upon being satisfied that no sufficient reason exists why the matter cannot be or ought not to be referred to arbitration.” In such cases the burden (*x*) lies on the plaintiff to show some sufficient reason why the dispute should not be so referred.

Restraint of Trade.

[47.]

MITCHEL *v.* REYNOLDS. (1711)

[1 P. WMS. 181.]

Leading eastwards from the Gray’s Inn Road, is, or till recently was, a street called Liquorpond Street. In that street, something like 200 years ago, there dwelt a pros-

(*t*) Willesford *v.* Watson (1873), L. R. 8 Ch. Ap. at p. 477; 42 L. J. Ch. 447; but see Piercy *v.* Young (1879), 14 Ch. D. 200; 42 L. T. 710.

(*u*) Building Societies Act, 1884 (47 & 48 Vict. c. 41). See *Western Suburban, &c. Co. v. Martin* (1886), 17 Q. B. D. 609; 55 L. J. Q. B.

382; *Christie v. Northern Counties Building Society* (1890), 43 Ch. D. 62; 59 L. J. Ch. 210.

(*x*) *Hodgson v. Railway Pass. Ass. Co.* (1882), 9 Q. B. D. 188; *Fox v. Railway Pass. Ass. Co.* (1885), 54 L. J. Q. B. 505; 52 L. T. 672.

perous baker. So prosperous was he that he baked himself a fortune, and retired on it into private life. But before retiring he sold his business to the plaintiff, and executed a bond in which he undertook not to carry on the business of a baker in the parish of St. Andrew, Holborn, for five years, under a penalty of 50*l*. The baker did not know his own mind. Retirement did not suit him. His fingers were everlastingly itching to be in the pudding, and the end of it was that long before the five years were over he was baking away as hard as ever, and in the aforesaid parish, too. But he had to pay Mitchel the 50*l*.

To make a contract in restraint of trade good, two conditions must be complied with :—

Partial restraint good if reasonable and there is consideration.

(1.) *There must be a consideration ;*

and this is necessary even though the contract is under seal.

(2.) *The restraint must be a reasonable one ;*

that is to say, it must not be greater than such as to afford a *fair protection* to the interest of the party in whose favour it is submitted to, and must not be injurious to the interests of the public.

The reasonableness of a restraint differs according to trades and professions ; whether any particular contract is reasonable or not, being a *question of law* for the Court. A tabular statement of cases (down to 1854), showing what restrictions have been held valid and what void in different kinds of business is subjoined to the report of the case of *Avery v. Langford* (y) ; and the later decisions in the same form are given at p. 345 of Sir F. Pollock's "Principles of Contract," 6th Edition (z).

Contracts that a solicitor shall not practise "in London or within 150 miles" (a), or (in another case) "in any part of Great Britain" (b) ; that a horse-hair manufacturer shall not trade "within 200 miles of Birmingham" (c) ; that a milkman shall not sell milk "within five miles from Northampton Square in the county of Middle-

Solicitor.

Horse-hair manufacturer.
Milkman.

(y) (1854), *Kay*, 667 ; 23 L. J. Ch. 837.

(z) See also *Perls v. Saalfeld*, [1892] 2 Ch. 149 ; 61 L. J. Ch. 409 ; *Moenich v. Fenestre*, [1892] 61 L. J. Ch. 737 ; 67 L. T. 602.

(a) *Bunn v. Guy* (1803), 4 East, 190 ; and see *Dendy v. Henderson*

(1855), 11 Ex. 194 ; 24 L. J. Ex. 324 ; *May v. O'Neill* (1875), W. N. 179 ; 44 L. J. Ch. 660.

(b) *Whittaker v. Howe* (1841), 3 Beav. 383.

(c) *Harms v. Parsons* (1861), 32 Beav. 328 ; 32 L. J. Ch. 247.

Surgeon. s^ox^o“(d); that a surgeon shall not practise on his own account
 Publisher. within seven miles of a country town(e); and that a publisher
 shall not carry on the trade “within 150 miles of the General
 Post Office, London”(f), have been held to be valid contracts in
 Dentist. restraint of trade. On the other hand, an agreement that a dentist
 —“a moderately skilful dentist”—should abstain from practising
 within 100 miles of York was held void, as the distance was greater
 than was necessary to protect the interest of the person with whom
 he had contracted(g).

Contract
 may be
 partly
 good and
 partly bad.

A contract in restraint of trade may be *partly good and partly bad*. Thus, in *Mallan v. May*(h), the defendant was engaged as an assistant to the plaintiffs, who were dentists, and promised that, when he left them, he would not practise as a dentist in London or in any other place in England or Scotland where they might have been practising. This covenant was held good as to London (“London” being held to be the city of London), but bad as to all the other places. So in a case(i) where a person bound himself not to carry on the trade of a perfumer, toyman, or hair merchant *within the cities of London or Westminster, or within the distance of 600 miles*, it was held that the badness of the restraint as to the 600 miles radius would not vitiate its goodness as to London and Westminster.

In all these cases the distance is measured, not by the nearest convenient route, but *as the crow flies*(k).

Until recently it was thought that, *if the area was unlimited*, a covenant in restraint of trade was on the face of it bad; and, for a considerable space of time, the law on this subject was in a very unsatisfactory and uncertain condition. The matter, however, has very recently been dealt with by the House of Lords in the important case of *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co.*(l), which must now be considered as the leading case on

Norden-
 felt's case.

(d) *Proctor v. Sargent* (1840), 2 M. & G. 20; 2 Scott, N. R. 289; and *Benwell v. Inns* (1857), 24 Beav. 307; 26 L. J. Ch. 663.

(e) *Sainter v. Ferguson* (1849), 7 C. B. 716; 18 L. J. C. P. 217. See also *Gravelly v. Barnard* (1874), 18 Eq. 518; 43 L. J. Ch. 659; *Palmer v. Mallett* (1887), 36 Ch. D. 411; 57 L. J. Ch. 226; and *Rogers v. Drury* (1887), 57 L. J. Ch. 504; 36 W. R. 496.

(f) *Tallis v. Tallis* (1853), 1 E. & B. 391; 22 L. J. Q. B. 185.

(g) *Horner v. Graves* (1831), 7 Bing. 735; 5 M. & P. 568.

(h) (1843), 11 M. & W. 653; 12 L. J. Ex. 376; and see *Baines v.*

Geary (1887), 35 Ch. D. 154; 56 L. J. Ch. 935; *Davies v. Lowen*, (1891) 64 L. T. 655; *Rogers v. Maddocks*, [1892] 3 Ch. 346; 62 L. J. Ch. 219.

(i) *Priece v. Green* (1847), 16 M. & W. 346; 16 L. J. Ex. 308. But see *Baker v. Hedgecock* (1888), 39 Ch. D. 520; 57 L. J. Ch. 889.

(k) *Moufflet v. Cole* (1872), L. R. 8 Ex. 32; 42 L. J. Ex. 8.

(l) [1894] A. C. 535; 63 L. J. Ch. 908. Former modern cases are *Leather Cloth Co. v. Lonsont* (1869), L. R. 9 Eq. 345; 39 L. J. Ch. 86; *Allsopp v. Wheatcroft* (1872), L. R. 15 Eq. 59; 42 L. J. Ch. 12; *Roussillon v. Roussillon*

this branch of law. It was held that *the true test of the validity of a covenant which is in restraint of trade, whether the restraint be general or partial, is whether it is or is not reasonable; and that such a covenant may be unlimited in point of space, provided that it is not more than is reasonably necessary for the protection of the covenantee, and is in no way injurious to the interests of the public.* The judgments of Lord Herschell, L.C., and Lord Macnaghten, contain an exhaustive review and criticism of the earlier cases on this point, and trace the changes in the law which have been rendered necessary by the altered conditions of commerce and of the means of communication which have been developed in recent years.

With regard to the right of the vendor of a goodwill to set up a new business and deal with his old customers, reference should be made to *Pearson v. Pearson* (*m*), where (*dissentiente* Lindley, L. J.) the case of *Labouchere v. Dawson* (*n*) was overruled in favour of greater freedom of solicitation. Pearson v. Pearson.

Combinations in restraint of trade, whether of masters or of men, are at common law invalid. The great case on the subject is *Hilton v. Eckersley* (*o*), where a bond entered into by a number of Wigan mill-owners, who agreed to decide the times, wages, &c., of all their workmen according to the resolutions of a majority of themselves, was held void. But it has been held that an agreement to parcel out among the parties to it the stevedoring business of a port, and so to prevent competition among the parties and to keep up the price of the work, is not necessarily invalid if carried into effect by proper means (*p*). "It is perfectly lawful," said the Court, in another case (*q*), "for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply, the Corporation of Birmingham with the commodity, that does not in the least restrict their right to deal *inter se*, nor does such dealing deserve to be characterized as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between

Hilton v. Eckersley.

(1880), 14 Ch. D. 351; 49 L. J. Ch. 339; *Davies v. Davies* (1887), 36 Ch. D. 359; 56 L. J. Ch. 962; *Mills v. Dunham*, [1891] 1 Ch. 576; 60 L. J. Ch. 362; *Badische Anilin Fabrik v. Schott*, [1892] 3 Ch. 417; 61 L. J. Ch. 698. These, and many earlier cases, are, of course, now annulled so far as they conflict with the modern rule established by the decision of the House of Lords in *Nordenfelt's case*.

(*m*) (1881), 27 Ch. D. 115; 51

L. J. Ch. 32. See the cases there cited, and also *Vernon v. Hallam* (1886), 34 Ch. D. 748; 56 L. J. Ch. 115; and *Smith v. Hancock*, [1894] 2 Ch. 377; 63 L. J. Ch. 477.

(*n*) (1872), L. R. 13 Eq. 322; 41 L. J. Ch. 427.

(*o*) (1856), 6 E. & B. 47, 66; 24 L. J. Q. B. 353.

(*p*) *Collins v. Locke* (1879), 4 App. Ca. 674; 48 L. J. P. C. 68.

(*q*) *Jones v. North* (1875), L. R. 19 Eq. 426; 44 L. J. Ch. 338.

themselves at a certain price, leaving one of them to make any other profit that he can." It has, however, recently been held that an agreement by the members of an association not to sell certain goods at less than a particular price for ten years, and to forfeit 10*l.* for each contravention of this agreement, was void (*r*).

A rule of a trade society that no member shall employ any traveller, carman, or outdoor employée who had left the service of another member without the consent in writing of his late employer, until after the expiration of two years from his leaving such service, is bad (*s*).

Commer-
cial con-
spiracy.

The law relating to what may be termed "commercial conspiracy," or combinations to exclude the competition of rival traders, was elaborately discussed in the recent very important case of the *Mogul Steamship Co. v. McGregor, Gow & Co.* (*t*). The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and, in consequence of such exclusion, sustained damage. The Court of Appeal (by Bowen and Fry, L. JJ., Lord Esher, M. R., dissenting), affirming the judgment of Lord Coleridge, C. J. (*u*), held that the association, being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable; and this decision was affirmed by the House of Lords. With this case should be compared the still more recent one of *Temperton v. Russell* (*x*), which held that a combination by two or more persons to induce others not to deal with, or to enter into contracts with, a particular individual, is actionable, if done for the purpose of injuring that individual, provided he is thereby injured.

Trade

Moreover, the Trade Union Act, 1871 (*y*), provides (sect. 3) that

(*v*) *Urmston v. Whitelegg* (1891), 55 J. P. 453.

(*s*) *Mineral Water Bottle Society v. Booth* (1887), 36 Ch. D. 465; 57 L. T. 573.

(*t*) [1892] A. C. 25; 61 L. J. Q. B. 295.

(*u*) 21 Q. B. D. 544; 59 L. T. 514; 23 Q. B. D. 598; 58 L. J. Q. B. 465.

(*x*) [1893] 1 Q. B. 715; 62 L. J. Q. B. 412. And see *Flood v. Jackson*, [1895] 2 Q. B. 21; 11 T. L. R. 335.

(*y*) 34 & 35 Vict. c. 31.

“The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.” Sect. 4, however, specifies certain exceptions. Every man has the right to get the best possible price for his work; but if others choose to work for less than the usual prices, the law will not permit violence or undue influence to be exercised upon them, or upon those by whom they are employed, or those with whom they are connected. The following cases may be consulted on this subject:—*Rex v. Batt* (1834), 6 C. & P. 329; *Walsby v. Anley* (1861), 3 El. & El. 516; 30 L. J. M. C. 121; *O'Neill v. Longman* (1863), 4 B. & S. 376; 9 Cox, C. C. 360; *Wood v. Bowron* (1866), L. R. 2 Q. B. 21; 36 L. J. M. C. 5; *Skinner v. Kitch* (1867), L. R. 2 Q. B. 393; 36 L. J. M. C. 116; *Reg. v. Druitt* (1867), 10 Cox, C. C. 592; 16 L. T. 855; *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; 37 L. J. Ch. 889; *Rigby v. Connol* (1880), 14 Ch. D. 482; 49 L. J. Ch. 328; *Duke v. Littleboy* (1880), 49 L. J. Ch. 802; 43 L. T. 216; *Wolfe v. Matthews* (1882), 21 Ch. D. 194; 51 L. J. Ch. 833; and *Strick v. Swansea Tin Plate Co.* (1887), 36 Ch. D. 558; 57 L. J. Ch. 438. Union Act,
1871.

The exclusive right of holding markets, and of preventing sales by others of marketable articles within the limits of the market, may be gained by (a) immemorial enjoyment, (b) charter from the Crown, (c) Act of Parliament. The important cases dealing with this subject are:—*Macclesfield v. Pedley* (1833), 4 B. & Ad. 397; 1 N. & M. 708; *Macclesfield v. Chapman* (1843), 12 M. & W. 18; 13 L. J. Ex. 32; *Ellis v. Bridgnorth* (1863), 15 C. B. N. S. 52; 32 L. J. C. P. 273; *Penryn v. Best* (1878), 3 Ex. D. 292; 48 L. J. Ex. 103; *Elwes v. Payne* (1879), 12 Ch. D. 468; 48 L. J. Ch. 831; *Goldsmid v. Great Eastern Ry. Co.* (1884), 9 App. Cas. 927; 54 L. J. Ch. 162; *Att.-Gen. v. Horner* (1885), 11 App. Cas. 66; 55 L. J. Q. B. 193; *Devonshire v. O'Brien* (1887), 19 L. R. Ir. 380; *Birmingham v. Foster* (1894), 70 L. T. 371. Markets.

Restraint of Marriage.

[48.]

LOWE v. PEERS. (1768)

[4 BURR. 2225 ; WILMOT, 364.]

Mr. Newsham Peers executed a document to this purport:—

*“I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself; if I do, I agree to pay to the said Catherine Lowe 1,000*l.* within three months next after I shall marry anyone else.”*

Ten years afterwards Peers married a girl that was not Catherine Lowe. The injured lady brought an action on the document, but after learned argument it was resolved that it was void as being in restraint of marriage. According to the view of the judges, Mr. Peers’s promise had *not* been to marry Mrs. Lowe, as might seem at first sight to be the case; but he had promised *not to marry anybody except* Mrs. Lowe: so that if that good widow from caprice, disinclination, or the claim of conflicting engagements, refused to marry him, he would be compelled to be a bachelor all his days.

Reason of
the thing.

A general restraint of marriage is against the policy of the law, because, as Lord Chief Justice Wilmot pointed out in the leading case, it *encourages licentiousness, and tends to depopulation*; and a condition imposing such a restraint is void. So also is a condition amounting to a *probable* prohibition, as where a testator’s legacy to his daughter was conditional on her marrying a man with an estate worth 500*l.* a year (z). “How many particular professions,” said the Lord Chancellor, in giving judgment in that case, “are virtually excluded by that condition? What man of the profession of the law has set out with a clear unincumbered real estate of

Keily v.
Monck.

(z) Keily v. Monck (1795), 3 Ridg. P. C. 205.

500*l.* a year, or has acquired such an estate for years after his entering into the profession? How many men of the other learned professions can come within the condition? It will in effect exclude 99 men in 100 of every profession, whether civil, military, or ecclesiastical. It in effect excludes nearly every mercantile man in the kingdom, for let his *personal* estate be never so great, unless he is seised of a *real* estate of the ascertained description, he is excluded. . . . In a word, the condition which this weak old man would have imposed upon his daughters as the price of their portions does, to my judgment, clearly and unequivocally lead to a total prohibition of their marriage, and as such ought to be condemned in every court of justice. And I cannot but say that the scene of enmity and discord and disunion which has now prevailed for years in this family ought to teach every man who hears me the mischievous folly of attempting to indulge his narrowness and caprice even after he has sunk into the grave." And even if the restraint is not general, but only for two or three years, there must be some good reason why the contractor should be restrained from marrying during that period (*a*).

But, as the general rule, *all conditions which do not, directly or indirectly, import an absolute injunction to celibacy are valid.*

How far
restraint
allowable.

Thus, conditions prohibiting marriage *before twenty-one* (*b*), or with a *specified person* (*c*), or with a *Scotchman* (*d*), or with a *papist* (*e*), or with a *domestic servant* (*f*), are not illegal.

Testators leaving young daughters frequently prohibit their marriage without the *consent of a trustee*. This consent, however, cannot be withheld corruptly or unreasonably (*g*); and the marriage will be allowed to take place if it is a proper one (*h*). It appears to be a moot point whether conditions requiring marriage with consent are broken by a first marriage without consent, so as to disable a legatee from taking upon a second marriage with consent (*i*).

Consent of
trustee.

Second marriages may be restrained. A husband, for instance, may leave his widow an annuity which is to cease on her marrying again. In *Allen v. Jackson* (*k*), a testatrix gave the income of certain property to her niece (who was her adopted daughter) and

Second
marriages.

(*a*) *Hartley v. Rice* (1808), 10 East, 22; *Baker v. White* (1690), 2 Vern. 215.

(*b*) *Stackpole v. Beaumont* (1796), 3 Ves. 89.

(*c*) *Jervois v. Duke* (1681), 1 Vern. 19.

(*d*) *Perrin v. Lyon* (1807), 9 East, 170.

(*e*) *Duggan v. Kelly* (1847), 10 Ir. Eq. Rep. 295.

(*f*) *Jenner v. Turner* (1880), 16 Ch. D. 188; 50 L. J. Ch. 161.

(*g*) *Dashwood v. Bulkeley* (1804), 10 Ves. 230.

(*h*) *Goldsmid v. Goldsmid* (1815), Coop. 225; 19 Ves. 368.

(*i*) See *Randal v. Payne*, 1 Bro. C. C. 55; *Page v. Hayward* (1705), 2 Salk. 570.

(*k*) (1875), 1 Ch. D. 399; 45 L. J. Ch. 310.

her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. That was just what happened. The niece died; the widower married again; and the gift over took effect. "The present state of the law," said Baggallay, L. J., "as regards conditions in restraint of the second marriage of a woman, is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance, it was confined to the case of the *testator being a husband* of the widow. In the next place, it was extended to the case of a *son making the will* in favour of his mother. That, I think, is laid down in Godolphin's Orphan's Legacy. Then came the case before Vice-Chancellor Wood of *Newton v. Marsden* (*l*), in which it was held to be a general exception *by whomsoever the bequest may have been made*. Now, the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a *woman*, and this case has reference to the second marriage of a *man*. But no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a *man*; and following the analogy of the other cases there seems *no reason at all why a distinction should be drawn between the two sexes*."

Marriage
brokerage
contracts.

Besides making contracts in general restraint of marriage void, the law exhibits its tender regard for the hallowed institution by declaring equally void a *marriage brokerage contract*, that is, a contract (*e.g.*, with a lady's maid) to bring about a particular marriage (*m*). A mother once told a candidate for son-in-lawship, "You shall not have my daughter, unless you will agree to release all accounts." He agreed, but the agreement was held to be a marriage brokerage contract, and void (*n*).

Future
separation.

Similarly, a contract relating to the *future* separation of a married couple is illegal and void, for such a state of things ought not to be considered likely to come about; it ought to be absent from the thoughts of the blissful pair; and indeed the contract itself might lead to a separation. But a contract relating to an *immediate* separation is valid, for it is necessary to make the best of a bad thing (*o*). If, however, after the separation deed has been executed, the contemplated separation does not take place, the deed becomes worthless, and cannot be construed as a voluntary settlement (*p*).

Immediate
separation.

(*l*) (1862), 2 J. & H. 356; 31 L. J. Ch. 690.

(*m*) *Hall v. Potter* (1695), 3 Lev. 411; *Cole v. Gibson* (1750), 1 Ves. 503.

(*n*) *Hamilton v. Mohun* (1710), 1 P. Wms. 118.

(*o*) *Hindley v. Westmeath* (1828), 6 B. & C. 200.

(*p*) *Bindley v. Mulloney* (1869), L. R. 7 Eq. 343; 20 L. T. 263.

A covenant not to revoke a will is not necessarily against public policy as being in restraint of a marriage (*q*).

Atheism.



COWAN *v.* MILBOURNE. (1867)

[49.]

[L. R. 2 Ex. 230 ; 36 L. J. Ex. 124.]

Mr. Cowan was in 1867 the secretary of the Liverpool Secular Society, and the defendant the proprietor of some Assembly Rooms there. Cowan engaged the rooms for a series of lectures to show that Our Lord's character was defective, and his teaching erroneous ; and that the Bible was no more inspired than any other book. At the time the defendant let the rooms he did not know the nature of the lectures to be delivered, and when he found out, he declined to complete his agreement. The secularists now sued him for breach of contract, but the Court decided that the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced at law. "*Christianity*," said Kelly, C. B., "*is part and parcel of the law of the land.*"

"Christianity is part of the law of England." This is shown not merely by the existence of a church establishment, but by the various punishments inflicted, or capable of being inflicted, on persons who profanely curse, who break the Sabbath, who use witchcraft, or who give expression to unorthodox views. In a judgment in a slavery case (*r*), Best, J., says, "The proceedings in our Courts are founded upon the law of England, and that law

Chris-
tianity
part of the
law of
England.

(*q*) Robinson *v.* Ommanney Ch. 440.

(1883), 21 Ch. D. 780 ; 23 Ch. D.
285 ; 51 L. J. Ch. 894 ; 52 L. J.

(*r*) Forbes *v.* Cochrane (1821), 2
B. & C. 448 ; 3 D. & R. 679.

Slavery.

again is founded upon the law of Nature, and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal Courts cannot recognise it." Notwithstanding this strong language, however, it would appear that a contract for the sale of slaves entered into and to be performed in a country where that unnatural traffic is lawful might be enforced in England (s).

Blasphemy.

The following summary from the *Law Times* of July 22nd, 1882, on the subject of blasphemy may be of interest:—

"Of the leading cases on this subject the earliest on record is that of one Atwood, in 15 Jac. 1, who was convicted of speaking words reflecting on religious preaching, viz., that it was 'but prating, and the hearing of service more edifying than two hours' preaching.' Notice may also be made of the trial of one Taylor (Vent. 293), for uttering gross blasphemies, in the course of which Chief Justice Hale observed that to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. On the same ground a conviction was sustained in the case of *R. v. Woolston* (Str. 834), where the libel stated that Christ was an impostor and fanatic, and his life and miracles were turned into ridicule. In 1763, again, one Annett was convicted of publishing a libel called 'The Free Inquirer,' tending to ridicule the Scriptures, and particularly the Pentateuch, by representing Moses as an impostor; and a similar result followed the case of *R. v. Williams*, in 1797, for publishing Paine's 'Age of Reason,' in which the authority of the Old and New Testament was denied, and the prophets and Christ were ridiculed. The same doctrine has been fully recognised in other cases, one of the latest, perhaps, being that of *Carlile* (3 B. & Ald. 161), who, in 1820, was sentenced to pay a fine of 1,500*l.*, to be imprisoned for three years, and to find sureties for his good behaviour during life.

"But, besides the common law, the Legislature itself has made certain provisions against this kind of offence. The statute 1 Edw. 6, c. 1, for example, enacts that persons reviling the sacrament of the Lord's Supper by contemptuous words or otherwise shall suffer imprisonment. By 1 Eliz. c. 2, again, if any minister shall speak anything in derogation of the Book of Common Prayer, he shall be punishable, as there mentioned, by imprisonment and loss of benefice. So, also, by 3 Jac. 1, c. 21, whoever shall use the name of the Holy Trinity profanely or jestingly in any stage-play or show, is made liable to a fine of 10*l.* Lastly, by 9 & 10 Will. 3, c. 30, it

(s) *Santos v. Illidge* (1859), 8 C. B. N. S. 861; 29 L. J. C. P. 348.

is enacted that, if any person educated in, or having made profession of, the Christian religion, shall by writing, teaching, or advised speaking, assert that there are more gods than one, or deny the Christian religion to be true, or the Scriptures to be of Divine authority, he shall, upon the first offence, be incapable of holding any office or trust; and on the second conviction shall be for ever incapable to bring any action, or to bear any office or benefice, and further shall suffer imprisonment for three years. It has been held, moreover, that the effect of this enactment is cumulative, and that an offender against it is still punishable at the common law."

In the recent case of *Reg. v. Ramsay and Foote* (*t*), where the defendants were indicted for the publication of blasphemous libels in a newspaper called the *Freethinker*, the jury were directed that a blasphemous libel did not consist in an honest denial of the truths of the Christian religion, but in "a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects." The summing up by Lord Coleridge, C. J., though the law may not be altogether sound, is an admirable specimen of judicial eloquence, and deserves careful attention. "It is no longer true," he said in the course of that address, "in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. . . . To base the prosecution of a bare denial of the truth of Christianity *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows, and that, though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression; I call it progression of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is denied without more, and therefore to say that now a man may be indicted upon such denial as for a blasphemous libel is, as I venture to think, absolutely untrue. I, for one, positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by" (*u*).

It was formerly supposed that persons not professing the Christian

Omichund
v. Barker.

(*t*) (1883), 48 L. T. 733; 15 Cox, C. C. 231.

(*u*) This passage, however, contained (as the "Law Times" for May 5th, 1883, very truly says) "a most dangerous principle," and

shows that "judicial claims, not to expound, but to make law to suit the times, must be watched so as to avoid the danger of infringing on the province of the Legislature."

faith were incompetent as witnesses. In the great case of *Omichund v. Barker* (*x*), however, it was settled that it was not so much a belief in Christianity as a belief in a God that was required from a witness; and the depositions of witnesses professing the Gentoo religion, who were sworn according to the ceremonies of their religion, taken under a Commission out of Chancery, were admitted to be read in evidence. But many persons were found who, though quite competent as witnesses, objected altogether, on religious grounds, to taking oaths; and Acts of Parliament had to be passed relieving them from the necessity of doing so, and permitting them to make affirmations instead (*y*). These Acts, however, did not meet the case of an atheist, who, though quite willing to take an oath, might be objected to as incompetent. But now, by 32 & 33 Vict. c. 68, s. 4, such a person may, "if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience," give evidence on his making a solemn promise to tell the truth.

Atheists as
witnesses.

Jews as
M.P.

That "Christianity is part of the law of England" has also been painfully proved by the difficulties thrown in the way of Jews who desired to sit in the House of Commons. In *Miller v. Salomons* (*z*) it was held that the words "upon the true faith of a Christian" were not a mere form of swearing, but an essential part of the oath of abjuration required by 6 Geo. 3, c. 53; so that Jews were effectually excluded from sitting and voting. In 1858, after a long and acrimonious struggle, a modification of the oath in favour of Jews was effected (*a*), and since that time they have frequently sat in Parliament with credit to themselves and benefit to the country. Whether the time has not now come when all oaths, whether in the witness-box, in Parliament, or elsewhere, might advantageously be abolished, is a question that has for some time occupied the attention of thoughtful men.

Abolition
of oaths.

Crema-
tion.

Crementation is illegal according to the common law, the Christian method of disposing of the dead being by burial (*b*). Independently of the principle that "Christianity is part of the law of England,"

(*x*) (1744), Willes, 538; 1 Atkyn, 21.

(*y*) See 17 & 18 Vict. c. 125, s. 20 (civil cases); and 24 & 25 Vict. c. 66 (criminal cases).

(*z*) (1853), 7 Ex. 475; 8 Ex. 779. See also *Att.-Gen. v. Bradlaugh* (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205, as to persons having no belief in a Supreme Being.

(*a*) 21 & 22 Vict. cc. 48, 49.

(*b*) *Williams v. Williams* (1882), 46 L. T. N. S. 275; and see *R. v. Stephenson* (1884), 13 Q. B. D. 331; 53 L. J. M. C. 176; *R. v. Price* (1884), 12 Q. B. D. 247; 53 L. J. M. C. 51; where it was held that to burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance, or to prevent a coroner holding an inquest.

it may be doubted whether a contract for cremating a dead body would not be contrary to public policy, as destroying evidence as to the mode of death.

Simony (so called, it is said, in allusion to Simon the Sorcerer, *Simony*.

who "offered them money," Acts viii. 18) may be mentioned in this connection. The leading case on the subject is *Fox v. The Bishop of Chester* (*c*), where it was held that the sale of the next presentation to a living (Wilmslow) was not necessarily bad under 31 Eliz. c. 6, because the incumbent was dying. But it would have been, if the purchaser had intended to present a particular clergyman, or if the living had been actually vacant at the time of the contract. It is also simony for a clergyman to buy the next presentation, and get himself presented to the living (*d*).

A recent case on simony is *Mosse v. Killick* (*e*), where the plaintiff, who was the incumbent and patron of a living in Yorkshire, put the rectory into repair and, with the sanction of his bishop, let it to a tenant for a certain period. Before the termination of the tenancy the plaintiff resigned the living, and presented the defendant to it. The presentation was made on the understanding and agreement that the defendant should, in consideration of having received the benefit of the repairs, hand over to the plaintiff any rent he received in respect of the tenancy between the date of the presentation and the termination of the tenancy. It was held that this was a simoniacal agreement, and the presentation therefore void under 31 Eliz. c. 6.

Mosse v. Killick.

Resignation bonds (*i. e.*, engagements by persons presented to livings to resign at some future period) were formerly void; and general resignation bonds are so still. But 9 Geo. 4, c. 94, now enables a clergyman, before being presented, to bind himself to resign in favour of some specified person. If the bond is made in favour of *two* persons, each of them must be, either by blood or marriage, a near relation of the patron.

Resignation bonds.

For an interesting recent case on church rates, see *Bell v. Bassett* (1883), 52 L. J. Q. B. 22; 47 L. T. 19.

(*c*) (1829), 6 Bing. 1.

(*e*) (1881), 50 L. J. Q. B. 300;

(*d*) *Winchcombe v. Bp. of Winchester* (1617), Hob. 165.

44 L. T. 149.

Sabbath-breaking.

[50.]

SCARFE *v.* MORGAN. (1838)

[4 M. & W. 270; 1 H. & H. 292.]

The defendant was a farmer, and circulated a printed card to the effect that a certain horse of his would be ready to receive mares on Sundays. Scarfe (who had before had dealings with Morgan) sent a mare to be covered. Some difficulty arising about payment, Morgan refused to give up the mare until all his demands were satisfied, and Scarfe brought this action of trover. One of Scarfe's main points was that the contract was illegal as having been made on Sunday. The point, however, was overruled, chiefly on the ground that *the farmer's allowing his stallion to cover mares was not trading in the course of his ordinary calling*, to which alone the statute referred.

Act of
Charles II.

Contracts made on Sunday are unlawful under 29 Car. 2, c. 7, which provides that "no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof, works of necessity and charity only excepted" (*f*), the intention of the Act being, as a judge said in 1826, "to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion;" and his lordship adds that "the Act cannot be construed according to its spirit unless it is so construed as to check the career of worldly traffic" (*g*). Attention should be directed to the following points:—

"Or other
person

(1.) The words "or other person whatsoever"—on the principle

(*f*) "Every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of 5*s*."

(*g*) *Fennell v. Ridler* (1826), 5 B. & C. 406; 8 D. & R. 204. See, however, Lord Kenyon's remarks in *R. v. Younger* (1793), 5 T. R. 451.

that general words are to be narrowed down by particular words which precede them—have been interpreted to mean “or other person whatsoever of the ‘tradesman, artificer, workman, or labourer’ class.”

On this construction it may be remarked that, since *Searfe v. Farmers*. Morgan was decided, it has been held that a farmer does not come within the description “or other person whatsoever,” as just explained, so that the decision ought to have been in Morgan’s favour on a different ground and at an earlier period (*h*).

(2.) To make the contract void, it *must have been made within the person’s “ordinary calling.”* For example, while the sale of a horse on Sunday by a horse-dealer would be void, such a sale by an ordinary person, though within the specified classes, would not be (*i*). So, the hiring of a labourer by a farmer (*h*), a guarantee given for the faithful services of a commercial traveller (*l*), and an attorney’s agreement (on which he made himself personally liable) for settling the affairs of a client (*m*), have been held not to be vitiated by the contracts having been entered into on Sunday.

(3.) To make the contract void, it *must be complete on Sunday.* If, however, a contract of sale (*e.g.*, of goods of the value of 10*l.*) is concluded on Sunday, it will not be purged of its taint merely because the goods are not delivered, nor any part of the price paid, till a subsequent week-day (*n*).

In a case in which a Scotch boy, apprenticed to a barber, declined to shave his master’s customers on Sunday, it has been held by the House of Lords that shaving is not a “work of necessity and charity” within the exception of the Act (*o*).

“It was said in the Court below,” remarked Lord Brougham, “that unless working persons, who do not themselves shave their beards, were allowed to resort to the barbers’ shops on Sundays, many decently disposed men would be prevented from frequenting places of worship, and from associating with their families or friends, from want of personal cleanliness. *But why should they not do the work on Saturday?*”

(*h*) *R. v. Silvester* (1863), 33 L. J. M. C. 79; 10 Jur. N. S. 360; and see *Sandiman v. Breach* (1827), 7 B. & C. 96; 9 D. & R. 796, where it was held that the Act did not apply to a stage coachman.

(*i*) *Drury v. De Fontaine* (1808), 1 Taunt. 131.

(*h*) *R. v. Whitnash* (1827), 7 B. & C. 596; 1 M. & R. 452.

(*l*) *Norton v. Powell* (1812), 4 M. & G. 42.

(*m*) *Peate v. Dicken* (1834), 1 C. M. & R. 422. It appears to be a moot point (*Peate v. Dicken*, 1 C. M. & R. 428) whether an attorney is within the statute. Probably he is *not*.

(*n*) *Bloxsome v. Williams* (1824), 3 B. & C. 232; 1 C. & P. 291; and *Simpson v. Nicholls* (1838), 3 M. & W. 219; 1 H. & H. 12.

(*o*) *Phillips v. Innes* (1837), 1 C. & F. 234.

Provisions. Meat, milk, mackerel, and bread are to a great extent excepted from the operation of the Act.

Sunday amusements. 21 Geo. III. c. 49, provides that any house opened for public amusement or debate on Sunday, to which persons are admitted by payment of money, shall be deemed a disorderly house, and the keeper (*p*) of it shall forfeit 200*l.* for every Sunday it is so used. A place where sacred music is performed, and an instructive address of a religious or, at all events, neutral character given, has been held not to be within the statute (*q*); but an aquarium, notwithstanding sacred music and real fish, is (*r*).

Lien—general and particular. The leading case is also an authority on the law of lien, it having been held that the owner of a stallion has a lien on a mare sent to be covered. Independently of agreement (by which a lien may, of course, exist, or be dispensed with where it would otherwise exist), liens in law are of two kinds, *particular and general*.

If I am a watchmaker, and you send me your watch to mend, the right that I have to keep it till you pay for its mending is a *particular* lien. Such a lien exists over all goods on which the person claiming the lien has bestowed unpaid-for time and trouble, and, very reasonably, is favoured by the law. But no charge can be made for warehousing (*s*).

General liens are liens in respect of a general balance due. They are not favoured by the law, and exist only by virtue of agreement, or custom, or the previous dealings of the parties. Solicitors, bankers (*t*), wharfingers, factors, insurance brokers, and, it is said, common carriers (*u*), have general liens.

Solicitor's lien. The lien of a solicitor is important enough to deserve a word of special notice. A solicitor has a lien for his professional charges on all deeds and documents of his clients that come properly into his possession, and also on money recovered, litigiously or by compromise, in the cause. But, when required to produce a document under a *subpœna duces tecum*, he cannot refuse to do so merely because it has not been paid for and he claims a lien on it (*x*). Nor

(*p*) As to who is "the keeper," see the recent case of *Reid v. Wilson*, [1895] 1 Q. B. 315; 64 L. J. M. C. 60.

(*q*) *Baxter v. Langley* (1868), L. R. 4 C. P. 21; 38 L. J. M. C. 1.

(*r*) *Terry v. Brighton Aquarium Co.* (1875), L. R. 10 Q. B. 306; 44 L. J. M. C. 173.

(*s*) *Bruce v. Everson* (1883), 1 C. & E. 18; *British Empire Shipping Co. v. Simes* (1860), 30 L. J. Q. B. 229; 8 H. L. C. 338.

(*t*) *London Chart. Bank of Aus-*

tralia v. White (1879), 4 App. Ca. 413; and see *Leese v. Martin* (1873), L. R. 17 Eq. 224; 43 L. J. Ch. 193; *In re Bowes*, *Strathmore v. Vane* (1886), 33 Ch. D. 586; 56 L. J. Ch. 143.

(*u*) *Rushforth v. Hadfield* (1806), 7 East, 224; *Aspinall v. Piekford* (1800), 3 Bos. & P. 44; *Stevens v. Biller* (1883), 25 Ch. D. 31; 53 L. J. Ch. 249; *Webb v. Smith* (1885), 30 Ch. D. 192; 55 L. J. Ch. 343.

(*x*) *Fowler v. Fowler* (1881), 50 L. J. Ch. 686.

does his lien extend to alimony *pendente lite* paid over to him as such, unless he holds the wife's written authority to him to receive it as her agent (*y*). But by 23 & 24 Viet. c. 127, s. 28, the Court before which any proceedings come may order the solicitor's costs to be made a charge on the property recovered. In *Boughton v. Boughton* (*z*), it was held that a solicitor could not assert his lien in such a way as to embarrass the proceedings in the suit. But a solicitor by whose instrumentality a judgment for payment of a sum of money is obtained is not the less entitled to a lien on the money for his costs because he ceased to be the solicitor before the trial (*a*). Where successive solicitors are employed in an action, and the fund in Court is insufficient for payment of all the costs, the solicitor who conducts the cause to its conclusion is entitled to be paid first, and the solicitor who was next previously employed is entitled to be paid next, and so on throughout, the latest in order of employment being entitled to priority; and it is immaterial that the previously employed solicitors may have obtained charging orders for their costs (*b*).

Wagering Contracts.

DIGGLE *v.* HIGGS. (1877)

[51.]

[2 Ex. Div. 422; 46 L. J. Ex. 721.]

A couple of athletes named Simmonite and Diggle agreed to walk one another at the Higginshaw Grounds, Oldham, for 200*l.* a side, Perkins to be referee, and Higgs final stakeholder and pistol-firer. The match duly came

(*y*) *Cross v. Cross* (1880), 43 L. T. 533.

(*z*) (1883), 23 Ch. Div. 169; 48 L. T. 413; and see *Re Galland* (1885), 53 L. T. 921; 31 Ch. D. 296; *In re Capital Fire Insurance Association* (1883), 21 Ch. D. 408; 53 L. J. Ch. 71; *In re Carter* (1885), 55 L. J. Ch. 239; 53 L. T. 630;

Boden v. Hensby, [1892] 1 Ch. 101; 61 L. J. Ch. 174.

(*a*) *In re Wadsworth* (1885), 29 Ch. D. 517; 54 L. J. Ch. 638.

(*b*) *In re Knight, Knight v. Gardner*, [1892] 2 Ch. 368; 61 L. J. Ch. 399; following *In re Wadsworth* (1886), 31 Ch. D. 155; 56 L. J. Ch. 127.

off, and Perkins decided that Simmonite had won. This decision would seem not to have met the approval of Mr. Diggle, who gave Higgs formal notice not to pay over the Stakes to Simmonite, and demanded back his 200*l*. In spite of this notice, Higgs paid Simmonite the whole 400*l*., and became the defendant in this action.

For the plaintiff it was contended that the agreement was a wager, and therefore that he *had a right to demand back the sum deposited by him before it was paid over*. The defendant, on the other hand, said that the agreement came within the proviso of 8 & 9 Vict. c. 109, s. 18, which rendered lawful “a subscription or contribution for a sum of money to be awarded to the winner of a lawful game,” and his friends relied on a certain case of *Batty v. Marriott (c)*, where it was held that a foot-race came within the proviso.

The judges, however, overruled that case, and gave Mr. Diggle back his money.

Wagers generally enforceable at common law.

At common law wagers, not being indecent, or contrary to public policy, or hurtful to the feelings of third parties, could be enforced by action. But wagers as to the sex of a person (*d*), as to the issue of a criminal trial (*e*), as to whether an unmarried woman would have a child before a certain time (*f*), or as to the result of a parliamentary election (*g*), were held to be unlawful. And, even when the subject-matter of a wager was quite innocent, if it were of a very frivolous character, the judges would sometimes, in an arbitrary fashion, refuse to try the case. It seems also that at common law contracts by way of gaming were lawful (*h*). But in 1845, after previous efforts in the same direction, the Legislature enacted (*i*) “that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that

Act of 1845.

(*c*) (1848), 5 C. B. 818; 17 L. J. C. P. 215.

(*d*) *De Costa v. Jones* (1778), Cowp. 729.

(*e*) *Evans v. Jones* (1839), 5 M. & W. 77; 2 H. & H. 67. And see *Gilbert v. Sykes* (1812), 16 East, 159; *Atherfold v. Beard* (1788), 2 T. R. 610; *Good v. Elliott* (1789), 3

T. R. 693.

(*f*) *Ditchburn v. Goldsmith* (1815), 4 Camp. 152.

(*g*) *Allen v. Hearn* (1785), 1 T. R. 56.

(*h*) *Sherbon v. Colebach* (1687), 2 Vent. 175.

(*i*) 8 & 9 Vict. c. 109, s. 18.

no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, *or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made*: provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The words italicised might at first sight seem fatal to a claim like Diggle's; but it had been expressly held in a previous case that they did not prevent a person from claiming back *his own* deposit at any time before it was paid over to his adversary, and on repudiating the wager (*k*).

Recovering deposit.

The intention of the Act, it has been held, is to strike not merely at wagering on *unlawful* games, but at wagering even on *lawful* games (*l*).

Wagering on lawful games.

Hampden *v.* Walsh (*m*) is an authority to the same effect as Diggle *v.* Higgs. A person named Hampden got it into his head that it was a popular error to suppose the world was round, and advertised a challenge in the newspapers to any scientific man to prove it, each side to deposit 500*l.* to abide the issue. The challenge was accepted by a Mr. Wallace, and the money duly placed in the hands of the defendant as stakeholder. Experiments were then made on the Bedford Level Canal, and eventually, of course, the referee decided in favour of rotundity. Walsh then gave Hampden notice that he should pay over the money to Wallace. Hampden objected, and demanded back his money, which, however, Walsh proceeded to pay to Wallace. In an action against him for having done so, it was held that Hampden was entitled to recover his deposit, the affair being a mere wager.

Is the world really round?

No action can be maintained by A. against B. on a wager, in which A. bets B. that B. will, and B. that he will not, pass his examination as a solicitor, for B. has the power of determining the wager in his own favour (*n*).

Although wagers are "*null and void*," they are not absolutely

"Null and void."

(*k*) Varney *v.* Hickman (1817), 5 C. B. 271; 17 L. J. C. P. 102; Martin *v.* Hewson (1854), 10 Ex. 737; 24 L. J. Ex. 174; Savage *v.* Madder (1866), 36 L. J. Ex. 178; 16 L. T. 600. And see Strachan *v.* Universal Stock Exchange, Limited, [1895] 2 Q. B. 329; 73 L. T. 6.

(*l*) Parsons *v.* Alexander (1855), 5 E. & B. 263; 24 L. J. Q. B. 277; Thorpe *v.* Coleman (1815), 1 C. B. 990; 14 L. J. C. P. 260; Martin

v. Smith (1838), 4 Bing. N. C. 436; 6 Scott, 268; Whaley *v.* Pajot (1799), 2 B. & P. 51; Ximenes *v.* Jaques (1775), 6 T. R. 499; 1 Esp. 311.

(*m*) (1876), 1 Q. B. D. 189; 45 L. J. Q. B. 238. See also Trimble *v.* Hill (1879), 5 App. Cas. 342; 49 L. J. P. C. 49.

(*n*) Fisher *v.* Waltham (1813), 4 Q. B. 889; 12 L. J. Q. B. 330.

illegal. Thus, if a man lost a wager, and got another to pay the money for him, until recently an action would lie for the recovery of the money so paid (*o*). And so if A. requested B. to make a bet for him with C. on a particular horse, and then, after B. had done so, the horse lost, B. might, notwithstanding the statute, have recovered from A. the money he had had to pay C. (*p*).

Gaming
Act, 1892.

The law on this point, however, has recently been altered by the Gaming Act, 1892 (*q*), which provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." The following cases, decided since the passing of this Act, should be referred to:—*Tatam v. Reeve* (*r*), which held that the Act prevents A., who has, at B.'s request, paid money in settlement of lost bets, from recovering the money from B., even though A. was no party to the betting; *De Mattos v. Benjamin* (*s*), which decided that the Act does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any sums received by the agent on account of such bets; *O'Sullivan v. Thomas* (*t*), where money deposited by A. with B. as stakeholder, to abide the result of a race between A. and a third party, was held not to be money paid under a wagering contract within the meaning of the Act, and, therefore, recoverable by A. from B. before it had been paid over by B. to the third party.

Tatam v.
Reeve.

De Mattos
v. Benja-
min.

O'Sullivan
v. Thomas.

Beeston v.
Beeston.

In *Beeston v. Beeston* (*u*) it appeared that the plaintiff had paid the defendant money to invest for him in betting on horse races. The right horses won, and the defendant gave the plaintiff a cheque,

(*o*) *Rosewarne v. Billing* (1816), 33 L. J. C. P. 55; 15 C. B. N. S. 316; and see *Read v. Anderson* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; *Bridger v. Savage* (1885), 15 Q. B. D. 363; 54 L. J. Q. B. 464; *Britton v. Cook*, W. N. (1887), 116; *Cohen v. Kittell* (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241.

(*p*) *Read v. Anderson*, *ubi sup.*

(*q*) 55 Vict. c. 9. It was decided in *Knight v. Lee*, [1893] 1 Q. B. 41; 62 L. J. Q. B. 28, that this Act is not retrospective; and, therefore, a betting agent can recover moneys

due to him before the Act, though the action is not commenced until after that date.

(*r*) [1893] 1 Q. B. 44; 62 L. J. Q. B. 30.

(*s*) (1894), 63 L. J. Q. B. 248; 70 L. T. 560.

(*t*) [1895] 1 Q. B. 698; 64 L. J. Q. B. 398.

(*u*) (1876), 1 Ex. D. 13; 45 L. J. Ex. 230; *Ex parte Pyke* (1878), 8 Ch. D. 754; 47 L. J. Bk. 100; *Seymour v. Bridge* (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; *Perry v. Barnett* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466.

which was afterwards dishonoured. In an action on the cheque the defence was raised that it was an attempt to enforce a contract prohibited by statute. It was held, however, that betting on horse races was not illegal in the sense of tainting any transaction connected with it. *Beeston v. Beeston* (*v*) was distinguished in the later case of *Higginson v. Simpson* (*x*). There the plaintiff was a tipster, and gave the defendant "Regal" as the probable winner of the Grand National. It was agreed between them that the plaintiff should have 2*l.* on "Regal" at 25 to 1 against the horse for that race; that is to say, that if the defendant backed "Regal" for the Grand National, and the horse won, the plaintiff was to have 50*l.* out of the defendant's winnings, but if the horse lost, the plaintiff was to pay the defendant 2*l.* Accordingly, the defendant backed "Regal," and it won. Ungrateful for his tip, however, he refused to pay the plaintiff the 50*l.*; and it was held that the money could not be recovered by action because the agreement was void within 8 & 9 Vict. c. 109, s. 18. So also money lent for the purpose of gaming cannot be recovered back (*y*). Whether a bond given simply to secure a racing debt is valid or not, appears to be a doubtful point. In the well-known case of *Bubb v. Yelverton* (*z*), it was unnecessary to decide that question, because, as Lord Romilly, M. R., said, the bond was given "not to pay racing debts, but to avoid the consequences of not having paid them." Though 8 & 9 Vict. c. 109, s. 18, does not expressly mention or allude to Stock Exchange transactions, it has been decided that agreements between buyers and sellers of shares and stocks to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions within the meaning of the statute (*a*). But in *Thacker v. Hardy* the statute was held not to be a good answer to the claim of a broker employed by the defendant to speculate for him on the Stock Exchange, for commission and an indemnity, the agreement being that the plaintiff should himself, as principal, enter into *real contracts of purchase and sale* with jobbers (*b*).

A tip for the Grand National.

Bubb v. Yelverton.

Stock Exchange transactions.

The Betting Houses Act, 1853 (*c*), makes it unlawful to keep or

Betting houses.

(*v*) See *ante*, n. (*v*), p. 166.

(*x*) (1877), 2 C. P. D. 76; 46 L. J. C. P. 192. But see *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(*y*) *McKinnell v. Robinson* (1838), 3 M. & W. 134; 1 H. & H. 146.

(*z*) (1870), L. R. 9 Eq. 471; 39 L. J. Ch. 428.

(*a*) *Grizewood v. Blane* (1851), 11 C. B. 526.

(*b*) (1878), 4 Q. B. D. 685; 48 L. J. Q. B. 289. And see *Universal Stock Exchange v. Stevens* (1892), 66 L. T. 612; 40 W. R. 494.

(*c*) 16 & 17 Vict. c. 119; and see 37 Vict. c. 15; 36 & 37 Vict. c. 38. It was held in *Pay v. Sims* (1889) (58 L. J. M. C. 39; W. N. (1889) 9), that licensed victuallers may be convicted under the Betting Houses

Shaw v.
Morley.

use any "house, office, room, or other place" for betting. This Act, however, does not apply to a case where members of a *bond fide* club make bets with each other in the club (*d*). In Shaw v. Morley (*e*) it was held that a wooden structure, unroofed, on the Doncaster racecourse was an "office" and a "place" within the meaning of the statute. So a stool and big umbrella kept up rain or no rain is a "place" (*f*); and so even is a small moveable box (*g*).

The Betting Act, 1874 (*h*), is supplementary to the Act of 1853, and is confined to such bets as are mentioned in the earlier Act. For this reason it was held in Cox v. Andrews (*i*), that it did not apply to advertisements offering information for the purpose of bets not to be made in any house, office, or place kept for that purpose.

Playing skittle pool for money in places licensed for the sale of intoxicating liquors is "gaming" within sect. 17 of the Licensing Act, 1872 (*k*).

Lotteries.

Lotteries are prohibited by 10 & 11 Will. III. c. 17, and other statutes, and declared to be public nuisances (*l*). By 42 Geo. III. c. 119, s. 2, it is made an offence to keep any office or place to exercise any lottery not authorized by Parliament. A man who erected a tent at Darlington, and sold packets of tea containing coupons for prizes, was held to have broken this statute (*m*).

The "mis-
sing word"

The recent case of Barclay v. Pearson (*n*) is an important decision

Act, 1853, s. 3, which is not, as regards them, repealed by the Licensing Act, 1872. And see Hornsby v. Raggett, [1892] 1 Q. B. 20; 61 L. J. M. C. 24; Ridgeway v. Farndale, [1892] 2 Q. B. 309; 61 L. J. M. C. 199; Reg. v. Preedy (1892), 17 Cox, C. C. 433; Bond v. Plumb, [1894] 1 Q. B. 169; 70 L. T. 405.

(*d*) See Downes v. Johnson, [1895] 2 Q. B. 203; 11 T. L. R. 426.

(*e*) (1868), L. R. 3 Ex. 137; 37 L. J. M. C. 105.

(*f*) Bows v. Fenwick (1874), L. R. 9 C. P. 339; 43 L. J. M. C. 107; Snow v. Hill (1885), 14 Q. B. D. 588; 46 L. J. M. C. 95.

(*g*) Gallaway v. Maries (1881), 8 Q. B. D. 275; 51 L. J. M. C. 53; Davis v. Stephenson (1890), 24 Q. B. D. 529; 59 L. J. M. C. 73.

(*h*) 37 Viet. c. 15.

(*i*) (1883), 12 Q. B. D. 126; 53 L. J. M. C. 34. But see Reg. v. Brown, [1895] 1 Q. B. 119; 64 L. J. M. C. 1; where it was held that

the offence of keeping a house for the purpose of betting with persons resorting thereto may be proved by shewing that the house was opened and advertised as a betting house, although no person ever physically resorted thereto. But where no other evidence than that of resorting is offered, there must be evidence of a physical resorting, and it is not sufficient to shew that letters and telegrams were sent to the accused directing him to make bets with the senders; and persons sending such letters and telegrams do not "resort" to the house.

(*k*) Dyson v. Mason (1889), 22 Q. B. D. 351; 58 L. J. M. C. 55.

(*l*) See Allport v. Nutt (1845), 1 C. B. 974; 14 L. J. C. P. 272; R. v. Buckmaster (1887), 20 Q. B. D. 182; 57 L. J. M. C. 25.

(*m*) Taylor v. Smetten (1883), 11 Q. B. D. 207; 52 L. J. M. C. 101; and see Barratt v. Burden (1894), 63 L. J. M. C. 33; 10 R. 602.

(*n*) [1893] 2 Ch. 154; 62 L. J. Ch. 636. But see Caminada v.

under this Act. There, the proprietor of a paper conducted competitions in the following manner:—A sentence was inserted in the paper with one word missing; intending competitors were required to cut out a coupon attached to the paper, to write the missing word on the coupon and send it, together with a fee of 1s. for each coupon, to the proprietor. The missing word was decided upon before the commencement of the competition. The entrance fees were divided amongst the successful competitors. It was held that this competition constituted a lottery within the meaning of 42 Geo. III. c. 119, and also that the competitors had a right to the return of their contributions, at all events, provided that they gave notice of their claim before the money had been distributed by the proprietor.

Art Union lotteries, constituted as provided by 9 & 10 Vict. c. 48, are allowable.

The Vagrant Act Amendment Act, 1873 (*e*), imposes penalties on persons gaming, &c., in public places. *A railway carriage while travelling on its journey* is “an open and public place to which the public have or are permitted to have access” within the Act (*p*). Gaming in public places.

In *Jenks v. Turpin* (*q*) the game of “baccarat” was held to be unlawful within sect. 4 of 17 & 18 Vict. c. 38; and it was laid down by Hawkins, J., that to constitute “unlawful gaming” it is not necessary that the games played shall be unlawful games, but that it is enough that the play is carried on in a “common gaming-house.” Baccarat.

The Betting and Loans (Infants) Act, 1892 (*r*), renders penal the inciting of infants to betting or wagering, or to borrowing money. Inciting infants to bet.

Hulton, or Reg. v. Hulton (1891), 60 L. J. M. C. 116; 64 L. T. 572; where it was held that advertisements in a paper offering prizes for those who selected winning horses, did not amount to a lottery within sect. 41 of the Lottery Act, 1823; and *Stoddart v. Sagar*, [1895]

2 Q. B. 474; 64 L. J. M. C. 234.
 (*e*) 36 & 37 Vict. c. 38, s. 3.
 (*p*) *Langrish v. Archer* (1882), 10 Q. B. D. 44; 52 L. J. M. C. 47.
 (*q*) (1884), 13 Q. B. D. 505; 53 L. J. M. C. 161.
 (*r*) 55 Vict. c. 4.

Impossible Contracts.

[52.]

TAYLOR v. CALDWELL. (1863)

[3 B. & S. 826; 32 L. J. Q. B. 164.]

In 1861 Mr. Caldwell agreed to let Mr. Taylor have the Surrey Gardens and Music Hall at Newington for four specified summer nights, on which Mr. Taylor proposed to entertain the British public with bands, ballets, aquatic sports, fireworks, and other festivities. Unfortunately, before these summer nights arrived, Mr. Caldwell's premises were destroyed by an accidental fire. Mr. Taylor had been put to great expense in preparing for his entertainment, and he submitted that, as the contract was an absolute one, Mr. Caldwell must pay damages for the breach. It was held, however, that the parties *must be taken to have contracted on the basis of the continued existence of the premises*, and as they had been burnt down without the fault of either party, both parties were excused.

Why did
he promise
absolutely?

Frost or
infectious
disease.

"*You shouldn't promise what you can't perform*," is a remonstrance as just as it is familiar. A man is not obliged to enter into an absolute contract. He may provide for as many contingencies as he pleases; and if he chooses to promise *absolutely* when it is in his power to promise *conditionally*, he has only himself to blame if the consequences are unpleasant. If, for instance, the charterer of a ship agrees to put a cargo on board at a particular port, he contracts absolutely, and does not protect himself against the chance of a frost(s), or the prevalence of an infectious disease(t), or a strike

(s) *Kearon v. Pearson* (1861), 31 L. J. Ex. 1; 7 H. & N. 386; and see *Kay v. Field* (1882), 47 L. T. 423; *Porteus v. Watney* (1878), 3 Q. B. D. 534; 47 L. J. Q. B. 643; *Appleby v. Myers* (1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331;

Howell v. Coupland (1876), 1 Q. B. D. 258; 46 L. J. Q. B. 147.

(t) *Barker v. Hodgson* (1814), 3 M. & S. 267; see also *Jones v. St. John's College* (1870), L. R. 6 Q. B. 115; 40 L. J. Q. B. 80; *Thorn v. London* (1876), 1 App. Ca. 120;

taking place (*u*), preventing or delaying the fulfilment of his undertaking. So, a tenant is not discharged from his covenant to pay rent, or to repair, by the premises being accidentally destroyed, or even by his being kept out of possession by the King's enemies (*x*). In August, 1873, on the occasion of his marriage, a gentleman contracted with trustees to insure his life on or before July 2nd, 1875. Before that date arrived, however, his life became uninsurable, and he died without having performed his contract. It was held that the breaking down of his health, being what all of us are liable to, was no excuse, and that the trustees were entitled to rank as creditors (*y*).

Paradine *v.* Jane.

Life becoming uninsurable.

But sometimes the contract is physically impossible at the time of its making, *and both the parties know it*. Such a contract is void. There is *no intention* to perform it on the one side, *no expectation* that it will be performed on the other. An undertaking to jump over the moon, or to run from the Temple to Scarborough and back in five minutes, would probably be held void for impossibility. If, however, the thing contracted for, however unlikely that any one should accomplish it, is just conceivably possible, the contract may be good; *e.g.*, if a man agrees to make a flying machine that will get across the Atlantic in two hours (*z*).

Jumping over the moon.

A man, moreover, may warrant the acts of third persons, or even a natural event possible in itself. Thus, it has been said that *a covenant that it shall rain to-morrow* might be good (*a*).

Sometimes the contract is impossible at the time of its making, but the parties do not know it. For example, there may be bargaining going on about a cargo supposed to be on the voyage, but which, as it happens, has been already sold by reason of sea-damage. Such a contract is void, being subject to the implied condition that the cargo, as such, is still in existence (*b*). So, the sale of a life annuity is impliedly conditional on the annuitant being alive at the time of the sale (*c*).

Ignorance of what has happened.

45 L. J. Ex. 487; and *Pandorf v. Hamilton* (1886), 17 Q. B. D. 674; 55 L. J. Q. B. 546.

(*u*) *Budgett v. Binnington*, [1891] 1 Q. B. 35; 60 L. J. Q. B. 1. But see *Hick v. Raymond*, [1893] A. C. 22; 62 L. J. Q. B. 98; affirming the decision of the Court of Appeal, sub nom. *Hick v. Rodocanachi*, [1891] 2 Q. B. 626; 61 L. J. Q. B. 42; *Castlegate Steamship Co. v. Dempsey*, [1892] 1 Q. B. 854; 61 L. J. Q. B. 620.

(*x*) *Paradine v. Jane* (1646), Aleyn, 26; and see *Manchester Bonded Warehouse Co. v. Carr*

(1880), 5 C. P. D. 507; 49 L. J. Q. B. 809; and *Marshall v. Schofield* (1882), 47 L. T. 406.

(*y*) *Arthur v. Wynne* (1880), 14 Ch. D. 603; 49 L. J. Ch. 603; and see *Gibbons v. Chambers* (1885), 1 C. & E. 577.

(*z*) *Clifford v. Watts* (1870), L. R. 5 C. P. 577; 40 L. J. C. P. 36.

(*a*) *Per Maule, J.*, in *Canham v. Barry* (1855), 15 C. B. 597; 24 L. J. C. P. 100.

(*b*) *Couturier v. Hastie* (1856), 5 H. L. C. 673; 22 L. J. Ex. 97.

(*c*) *Strickland v. Turner* (1852), 7 Ex. 208; 22 L. J. Ex. 115. And

Too ill to
come.

When the fulfilment of a contract for *personal services* is prevented by the *act of God*, the promisor is excused, unless it clearly appears from the terms of the contract that he was to be liable whatever happened (*d*). A lecturer, for instance, who did not attend as expected, would have a sufficient legal excuse in a sudden illness. So of an author who had agreed to write a book. But he ought to give the earliest notice that is reasonably practicable. In such a case as this, the privilege of rescinding the contract is not merely that of the invalided performer, but also that of the party engaging him, who may decline to have a man who is too ill to do his work properly (*e*). So, too, if a master dies during the service, the servant has no remedy against his executors (*f*).

Station not
wanted.

The intervention of an Act of Parliament will also excuse the performance of a promise, because parties must be considered as contracting with reference to the existing state of the law, and *lex non cogit ad impossibilia*. In the leading case on this point a lessor had covenanted that no buildings should be erected in a paddock fronting the demised premises, somewhere in Camberwell, and then a railway company, under its compulsory powers, erected a station there (*g*).

As already stated, *Taylor v. Caldwell* was decided on the ground that when the performance depends on the continued existence of the thing, a condition is implied that the impossibility arising from its accidental destruction shall excuse performance. It has been followed in two important cases to which reference should be made.

Appleby v.
Myers.

In *Appleby v. Myers* (1867) the plaintiff had agreed with the defendant to put up some machinery on his premises to be paid for when finished. In the course of the work, premises, machinery, and everything were destroyed by fire. It was held that both parties were excused from further performance, and that no liability accrued on either side (*h*). In *Howell v. Coupland* (1876) a farmer had agreed to sell to a potato merchant 200 tons of potatoes grown on a particular piece of land belonging to the former. Before the

Howell v.
Coupland.

see sect. 6 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which provides that "where there is a contract for the sale of *specific goods*, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

(*d*) *Boast v. Firth* (1868), L. R. 4 C. P. 1; 38 L. J. C. P. 1; and *Robinson v. Davison* (1871), L. R. 6 Ex. 269; 40 L. J. Ex. 172.

(*e*) *Poussard v. Spiers* (1876), 1 Q. B. D. 410; 45 L. J. Q. B. 621.

(*f*) *Farrow v. Wilson* (1869), L. R. 4 C. P. 744; 38 L. J. C. P. 326.

(*g*) *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; and see *Brewster v. Kitchin* (1678), 1 Salk. 198; and *Mayor of Berwick v. Oswald* (1853), 1 E. & B. 295; 22 L. J. Q. B. 129.

(*h*) L. R. 2 C. P. 651; 36 L. J. C. P. 331.

time for performance arrived, the farmer's potatoes were attacked by the potato blight, and he was only able to deliver about 80 tons. It was held that an action to recover damages for the non-delivery of the residue could not be maintained (*i*). And now it is expressly provided by sect. 7 of the Sale of Goods Act, 1893 (*k*),^f that "where there is an agreement to sell *specific goods*, and subsequently the goods, without any fault on the part of the seller or buyer, perish *before the risk passes* to the buyer, the agreement is thereby avoided." As to *when* the risk passes, see *post*, p. 257 *et seq.*

On the other hand, in the recent case of *Turner v. Goldsmith* (*l*), an action for damages was held to be maintainable against a shirt manufacturer who had agreed to employ the plaintiff as agent and traveller for five years. After about two years the defendant's manufactory was burnt down, and he did not resume business, and had thenceforth ceased to employ the plaintiff. This case should be distinguished from *Rhodes v. Forwood* (*m*).

Turner v.
Goldsmith.

The recent case of *Hamlyn v. Wood* (*n*) may be referred to here, though the question determined was as to the circumstances under which the Court will imply a term which is not expressed in a written contract. A., who carried on business as a brewer, entered into an agreement in writing, by which he agreed to sell to B., and B. agreed to buy, all the grains made by A., at the average of the rates charged each year by certain specified firms, from 1885 until 1895. In 1890 A. sold his business, and in consequence ceased to supply grains to B. It was held that a term could not be implied in the contract to the effect that A. would not by any voluntary act of his own prevent himself from continuing the sale of grains to B. for the period mentioned. "It would have been a different thing," said Kay, L. J., "if the contract had been to pay so much down for a supply of grains for ten years."

Hamlyn v.
Wood.

(*i*) 1 Q. B. D. 258; 46 L. J. Q. B. 147.

(*k*) 56 & 57 Vict. c. 71.

(*l*) [1891] 1 Q. B. 544; 60 L. J. Q. B. 247.

(*m*) (1876), 1 App. Cas. 256; 47 L. J. Ex. 396.

(*n*) [1891] 2 Q. B. 488; 60 L. J. Q. B. 734.

INTERPRETATION AND OPERATION.

Written Contracts and Oral Evidence.

[53.]

GOSS v. NUGENT. (1833)

[5 B. & AD. 58; 2 N. & M. 28.]

Lord Nugent entered into a written agreement with Mr. Goss to buy from him several lots of land for 450*l.*, the vendor undertaking to make a good title to all the lots. Soon afterwards Goss found that as to one of the lots he could not make a good title; and of course Lord Nugent would then have been perfectly justified in retiring from the transaction. Instead of doing so, he *agreed orally to waive the necessity of a good title being made as to that lot.* Afterwards, however, his lordship seems to have altered his opinion as to the desirability of becoming the owner of the land, and he declined to pay the purchase-money, relying on the objection to the title. In answer to that, Mr. Goss wished to prove that after Lord Nugent knew about the defect of the title he agreed to waive it. This, however, was not allowed, for the rule is that *a written contract within the Statute of Frauds cannot be varied by oral evidence of what passed between the parties subsequently to the making of it.*

The rule that a written contract cannot be varied by parol is subject to one or two exceptions.

Supposing the contract to be one which, though it *is* in writing, *need not have been*, it may be varied by parol evidence of what took place between the parties *after* the date of the agreement. Thus, if the original agreement between Goss and Nugent had not been required by the Statute of Frauds to be in writing, Nugent's consent to take one lot though the title was bad might have been proved (*a*).

And, notwithstanding the general rule that parol evidence of what took place between the parties *previously to or contemporaneously with* the written agreement is inadmissible, such evidence may nevertheless be given to show that the execution of the written agreement was conditional on some event happening; in fact, that a document purporting to be a final and absolute contract purports to be what it is not. Thus, in *Pym v. Campbell* (*b*), the parties had entered into a written agreement for the sale of an interest in a patent, and *at the same time had verbally agreed that the sale should not take place unless* an engineer named Abernethie approved of the invention. Abernethie did not approve, and the question was whether the condition could be proved. It was held that it could, on the ground that the object of the evidence offered was, not to vary a written agreement, but to show that there was *not an agreement at all*. Similar evidence was also admitted in a case where two farmers had agreed in writing that one of them should transfer his farm to the other, and had at the same time verbally agreed that the transfer should be conditional on the landlord's consent (*c*). To take yet another illustration of constant occurrence, a cattle-dealer a few years ago wanted to send some cattle from Guildford to the Islington market. They told him at Guildford Station that the beasts would be duly forwarded to King's Cross; but they induced him to sign a consignment note by which the cattle were directed to be taken to the Nine Elms Station, which, of course, was not so far as the cattle-dealer expected them to go. At this intermediate station they remained, and suffered injury from not being fed or looked after properly. The company's view was that the consignment note was conclusive evidence of the terms of the contract, and therefore that they had never undertaken to carry beyond the Nine Elms Station. But for the cattle-dealer it was successfully contended *that the consignment note did not constitute a complete contract*, and that parol evidence could be given of the con-

When agreement need not have been in writing.

To show condition.

Consignment note.

(*a*) See also *Eden v. Blake* (1845), 13 M. & W. 614; 14 L. J. Ex. 191; *Noble v. Ward* (1867), L. R. 2 Ex. 135; 36 L. J. Ex. 91; *Mercantile Bank of Sydney v. Taylor*, [1893]

A. C. 317; 57 J. P. 741.

(*b*) (1856), 6 E. & B. 370; 25 L. J. Q. B. 277.

(*c*) *Wallis v. Liffel* (1861), 11 C. B. N. S. 369; 31 L. J. C. P. 100.

versation that had taken place between the plaintiff and the company's servants before the consignment note was signed (*d*).

On the other hand, when a writing appears to be a complete contract, oral evidence to vary it is inadmissible. In *Evans v. Roe* (*e*), for instance, a memorandum in writing by which the plaintiff agreed to become foreman of the defendant's works was construed to show a weekly hiring, and it was held that evidence of a conversation, at the time of signing the contract, tending to show that a yearly hiring was intended, could not be given.

There are other cases, however, in which parol evidence may be given, notwithstanding that there is a written contract.

Separate oral agreement.

"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them" (*f*), may be proved, *e.g.*, on the execution of a lease, an oral promise by the lessor to keep down the game (*g*).

To show fraud, illegality, &c.

Moreover, oral evidence may be given to prove fraud or illegality, to show the situation of the parties (*h*), to ascertain the meaning of illegible or unintelligible characters, to explain technical or provincial expressions, to bring in usage of trade, to identify the subject-matter, to introduce a principal not named in the contract (*i*), and for a variety of similar purposes.

"But evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used" (*k*).

Latent and patent ambiguities.

An important distinction as to when oral evidence can be given to affect a written instrument, and when it cannot, is between a *latent* and a *patent* ambiguity. A *latent* ambiguity is not apparent on the face of the instrument. The document seems to the stranger reading it to be plain and simple enough; but, really, there are two states of fact equally answering to the instrument. To correct such an ambiguity, and show what was intended, parol evidence is

(*d*) *Malpas v. L. & S. W. Ry. Co.* (1866), L. R. 1 C. P. 336; 35 L. J. C. P. 166.

(*e*) (1872), L. R. 7 C. P. 138; 26 L. T. 70; and see *Cato v. Thompson* (1886), 9 Q. B. D. 616; 47 L. T. 491.

(*f*) Steph. Dig. Ev. (5th ed.), p. 96; *Williams v. Jones* (1888), 36 W. R. 573.

(*g*) *Morgan v. Griffith* (1871),

L. R. 6 Ex. 70; 40 L. J. Ex. 46; *Marzetti v. Smith* (1882), 49 L. T. 580; 1 C. & E. 6; *Aste v. Stumore* (1884), 1 C. & E. 319.

(*h*) *Newell v. Radford* (1867), L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*i*) *Trueman v. Loder* (1840), 11 A. & E. 539; 3 P. & D. 567.

(*k*) Steph. Dig. Ev. 99; and see *Blackett v. Roy. Exch. Ass. Co.* (1832), 2 C. & J. 241; 2 Tyr. 266.

admissible. Thus, where a devise was to Stokeham Huthwaite, *second* son of John Huthwaite, whereas really Stokeham Huthwaite was the *third* son, evidence of the surrounding circumstances was admitted to show whether the testator had made a mistake in the name or in the description (*l*). But parol evidence cannot be given to correct a *patent* ambiguity. Thus, in a case where a bill of exchange had been drawn for "Two hundred pounds," but the figures at the top were "245/," and the stamp corresponded to the higher amount, evidence was not admitted to show that 245/ was really the sum intended (*m*). In the well-known case of *Doe v. Needs* (*n*), Doe v.
Needs. a man had devised one house to George Gord, the son of George Gord, a second to George Gord, the son of John Gord, and a third to "*George, the son of Gord.*" Evidence was admitted to show that the testator really meant George, the son of *George* Gord. To the reception of such evidence it was objected that the ambiguity was *patent*. But it was answered that it could only appear ambiguous by showing *aliunde* the non-existence of a George, the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had.

Though parol evidence may rarely be given to *vary* a written contract, it may generally be given to *rescind* it altogether; and the better opinion is that this is so even where the contract is one of those which are required by statute to be in writing (*o*). But a contract in writing good under the Statute of Frauds is not rescinded by a subsequent invalid oral contract intended to be substituted for the former one (*p*). Oral evidence to
rescind.

A deed cannot be varied or discharged except by another deed (*q*). But, in an action to recover unliquidated damages for breach of a contract under seal, accord and satisfaction *after breach* is a good plea.

(*l*) *Doe d. Le Chevalier v. Huthwaite* (1826), 3 B. & Ald. 632.

(*m*) *Sanderson v. Piper* (1839), 5 Bing. N. C. 425; 7 Scott, 408.

(*n*) (1836), 2 M. & W. 129.

(*o*) *Goman v. Salisbury* (1684), 1 Vern. 240.

(*p*) *Noble v. Ward* (1867), L. R. 2 Ex. 135; 36 L. J. Ex. 91; *Moore v. Campbell* (1854), 10 Ex. 323; 23 L. J. Ex. 310.

(*q*) *West v. Blakeway* (1841), 2 M. & G. 729; 3 Scott, N. R. 199.

Written Contracts and Evidence of Usage.

[54.]

WIGGLESWORTH *v.* DALLISON. (1779)

[1 Doug. 200.]

By lease dated March 2nd, 1753, Dallison let Farmer Wigglesworth have a field in Lincolnshire for 21 years. In the last year of his tenancy, though he knew that he had to give up the land almost immediately, the farmer sowed his field with corn. In doing what might seem a rash and improvident act, Mr. Wigglesworth was relying on a certain local custom, which entitled an out-going tenant of lands to his way-going crop, that is, to the corn left standing and growing at the expiration of the lease. Dallison's answer to this claim was that, if any such custom existed at all, it had no application to the present case, where the terms between landlord and tenant had been carefully drawn up in a lease by deed, and no mention made therein of any custom. The Court, however, decided in favour of the custom, Lord Mansfield remarking that while it was just and reasonable and for the benefit of agriculture, it *did not alter or contradict* the agreement in the lease, but only superadded a right.

Custom
cannot
vary
written
contract.

Parol evidence of the custom of a particular place or trade cannot be given to *vary* a written contract. If the terms of the contract are perfectly clear and exhaustive (and whether they are so is *for the Court*, and not for the jury to decide) (*r*) the maxim, *expressum facit cessare tacitum*, has application. In one case (*s*), it appeared that by the custom of the country the out-going tenant was entitled to an allowance for folage from the incoming tenant. This, therefore, if the lease had been silent on the subject, would have had to be paid. But the lease was *not* silent. It particularly specified the

(*r*) *Bowes v. Shand* (1877), 2 App. Cas. 455; 46 L. J. Q. B. 561. (*s*) *Webb v. Plummer* (1818), 2 B. & Ald. 746.

payments which were to be made by the incoming to the out-going tenant, *and amongst them it did not mention any payment in respect of folage*. It was held, therefore, that the terms of the lease were perfectly clear, and excluded the custom. "Where there is a written agreement between the parties," said Bayley, J., "it is naturally to be expected that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone. The custom of the country applies to those cases only where the specific terms are unknown; and it is founded on this principle, that justice requires that a party should quit upon the same terms as he entered."

The maxim is, *In contractis tacite insunt que sunt moris et consuetudinis*. Maxim.

So, too, in mercantile contracts. If you insure a ship and cargo for a voyage, and the terms of the policy are that "the insurance on the ship shall continue till she is moored 24 hours, *and on the goods till safely landed*," and your ship reaches the haven, and has been moored the 24 hours, and then afterwards, and *before being landed*, the goods are lost, the insurance people will not be allowed to cheat you by showing a custom that the risk *on the goods as well as on the ship* expires in 24 hours; why, you expressly stipulated that ship and cargo should stand on different footings; and are entitled to the benefit of your foresight, all the customs in the universe notwithstanding (*t*). Similarly, when a man in the pig trade sold what he warranted to be "prime singed bacon," but which proved to be neither palatable or fragrant, he was not permitted to turn round and produce a convenient custom in his trade to the effect that "prime singed bacon" is prime singed bacon none the less because it happens to be very much tainted (*u*). So, in the recent case of *Hayton v. Irwin* (*x*), where by the terms of a charter-party a ship was to deliver at Hamburg, "or so near thereto as she could safely get," it was held that a defence alleging that by the custom of the port of Hamburg the charterer was not bound to take delivery elsewhere than at Hamburg, was bad, inasmuch as it sought to set up a custom inconsistent with the written contract.

Our
"prime
singed
bacon."

But though a written contract cannot be *varied* by evidence of the But may

(*t*) *Parkinson v. Collier* (1797), Park Ins., 8th ed. p. 653.

(*u*) *Yates v. Pym* (1816), 6 Taunt. 416; 1 Holt, N. P. 95.

(*x*) (1879), 5 C. P. D. 130; 41 L. T. 666. See also *Barrow v. Dyster*

(1884), 13 Q. B. D. 635; 51 L. T. 573; *Pike v. Ongley* (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373; *The Nifa*, [1892] P. 111; 62 L. J. P. 12.

explain or add terms. custom of a particular trade or place, it may be *explained* thereby, and it may have *incidents annexed*.

(1.) It may be *explained*. Evidence has been admitted to show that the Gulf of Finland, though not geographically so, was always considered by merchants as part of the Baltic (*y*); that "good barley" and "fine barley" were different things (*z*); that 1,000 rabbits meant 1,200 (*a*); and that, when a young lady was engaged as an actress for "three years," the three years meant *only the theatrical seasons* of those years (*b*).

Custom to take holidays.

(2.) *Incidents* may be *annexed*. The leading case is an excellent illustration here. So is *Reg. v. Stoke-upon-Trent* (*c*), where it was held that where some workmen by written contract engaged themselves "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," evidence might nevertheless be given of a custom in the particular trade for the workmen to have certain holidays in the year, and the Sundays to themselves. The principle on which incidents are allowed to be annexed to written contracts is that "the parties *did not mean to express in writing the whole of the contract* by which they intended to be bound, but to contract with reference to certain known usages" (*d*).

Stock Exchange usages.

Except when the mode of dealing is that of a particular house, such as Lloyd's (in which case he must be proved to have been acquainted with it) (*e*), a man is bound by the usages of the place or trade with which his contract has to do, and his ignorance of those usages is immaterial. A man, for instance, who employs a broker on the Stock Exchange is bound by the usages of the Stock Exchange (*f*); and a man in London who authorizes another to contract for him at Liverpool is bound by the Liverpool usages.

Requisites of custom.

To make a particular custom good, it must be *immemorial, continued, peaceable, reasonable, certain, compulsory, and not inconsistent*. Reasonableness is a question of law for the Court. In *Hall v. Nottingham* (*g*), it was held that a custom for the inhabi-

(*y*) *Uhde v. Walters* (1811), 3 Camp. 16.

(*z*) *Hutchison v. Bowker* (1839), 5 M. & W. 535.

(*a*) *Smith v. Wilson* (1832), 3 B. & Ad. 728.

(*b*) *Grant v. Maddox* (1846), 15 M. & W. 737; 16 L. J. Ex. 227.

(*c*) (1843), 5 Q. B. 303; 13 L. J. Q. B. 41.

(*d*) Per Parke, B., in *Hutton v. Warren* (1836), 1 M. & W. 475.

(*e*) *Gabay v. Lloyd* (1825), 3 B. & C. 793; 5 D. & R. 611.

(*f*) *Sutton v. Tatham* (1839), 10 Ad. & E. 27; *Bayliffe v. Butterworth* (1847), 1 Ex. 425. But see *Neilson v. James* (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369; *Seymour v. Bridge* (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; *Loring v. Davis* (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; *Davis v. Howard* (1890), 24 Q. B. D. 691; 59 L. J. Q. B. 133; *Smith v. Reynolds* (1892), 66 L. T. 808.

(*g*) (1875), 1 Ex. Div. 1; 45 L. J. Ex. 59.

taunts of a parish to enter on a person's field in the parish, put up a maypole, dance, play at kiss-in-the-ring, and otherwise enjoy themselves, at any time in the year, in defiance of the proprietor, was good. But in the previous case of *Sowerby v. Coleman* (*h*), it had been held that a custom for inhabitants of a parish to train and exercise horses at all seasonable times of the year in a place *beyond the limits of the parish* was bad. And in another recent case (*i*), it was held that a custom that an out-going tenant should look not to the landlord, but to the incoming tenant, for payment for seeds, tillages, &c., could not be supported, for it was "unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants." In *Tucker v. Linger* (*k*), it was held that a custom, universal in the chalk districts, for the tenant of a farm to sell the flint stones turned up in ploughing, was reasonable, and could be proved, notwithstanding an agreement reserving to the landlord "all mines, minerals, quarries of stone, sand, brick-earth, and gravel." "It is good for the land," said Jessel, M. R., "that the flints should be removed, and it appears to me not unreasonable that the tenant, who has to remove them as injurious to the land, should sell them for his own benefit. I think the Court should not interfere with a custom of the country except upon very strong grounds."

Dancing in somebody else's field.

Exercising horses.

Selling flint stones turned up in ploughing.

Construction of Contracts.

ROE *v.* TRANMARR. (1758)

[55.]

[WILLES, 632.]

A deed bade fair to become void altogether as purporting to grant a freehold *in futuro*—a thing which the law will not allow. It was saved, however, from this untimely fate by the merciful construction that, though void as what it purported to be, it might yet avail as a covenant

(*h*) (1867), L. R. 2 Ex. 96; 36 L. J. Ex. 57.

(*i*) *Bradburn v. Foley* (1878), 3 C. P. D. 129; 47 L. J. Q. B. 331.

(*k*) (1882), 21 Ch. D. 18; 51 L. J. Ch. 713; and see *Goodman v. Saltash* (1882), 7 App. Cas. 633; 52 L. J. Q. B. 193.

to stand seised, the Court citing the maxim, *benigne facienda sunt interpretationes chartarum, ut res magis valeat quam pereat*; and it is in connection somehow with this decision that Mr. Trammarr has succeeded in building himself an everlasting name.

Intention
of con-
tracting
parties.

In construing a written contract (which construction is *for the Court*), the *intention* of the contracting parties must be looked to, *the sense in which the promisor believed that the promisee accepted the promise* being the principal test. But, on the other hand, it is of no consequence what the intention of the contracting parties was if their written agreement, though totally inconsistent with such intention, is precise and clear.

The chief rules of construction are the following:—

Construc-
tion must
be reason-
able.

(1.) The construction must be *reasonable*.

One surgeon sold his business to another and covenanted not to practise within a certain distance. On the reasonable construction of this covenant it was held not to have been broken by the retired surgeon's acting in an emergency, so long as he was not trying to get his practice back (*l*). So, in a charter party, "the words '*as near thereto as she can safely get*' must receive a reasonable and not a literal application" (*m*). So, too, where a young man living with his father in Lambeth was at the same time apprenticed to some mechanical engineers in the same district, a notice to remove to Derby was held unreasonable (*n*).

Liberal.

(2.) The construction must be *liberal*.

For example, the masculine will generally include both genders.

Favour-
able.

(3.) The construction must be *favourable*.

If it is possible to put two constructions on an agreement,—one which would make it illegal and void, and the other which would not, the latter view must be taken. See the leading case.

Ordinary
sense of
words.

(4.) Words must be construed in their *ordinary sense*.

An annuity was to become void if a woman, separated from her husband, "associated" with a particular person. It was held that to receive the man's visits whenever he chose to call was "associating" with him, and that, in fact, all intercourse, however innocent, was prohibited (*o*). In the recent case of *McCowan v.*

(*l*) *Rawlinson v. Clarke* (1845), 14 M. & W. 187; 14 L. J. Ex. 361.

(*m*) Per Lush, J., in *Capper v. Wallace* (1880), 5 Q. B. D. 163; 49 L. J. Q. B. 250.

(*n*) *Eaton v. Western* (1882), 9

Q. B. D. 636; 52 L. J. Q. B. 41.

(*o*) *Dormer v. Knight* (1809), 1 Taunt. 417; and see *Barton v. Fitzgerald* (1812), 15 East, 530; *Biddlecombe v. Bond* (1835), 4 Ad. & E. 332; 5 N. & M. 621.

Baine (*p*), the law was stated by Lord Watson to be that "contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; and another in the case where their conventional meaning is not the same with their legal sense. In the latter case, the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation."

Usage, however, may give words a *technical meaning*.

(5.) The *whole context* must be considered.

Context.

One part of the document may throw important light on another; *ex antecedentibus et consequentibus fit optima interpretatio*. The luminous judgment of Lord Chelmsford, L. C., in *Monypenny v. Monypenny* (*q*), and the case of *Piggott v. Stratton* (*r*), may be referred to in illustration of this rule.

(6.) The words of a contract must be construed most *strongly* *Contra proferentem*.
against the contractor.

Verba chartarum fortius accipiuntur contra proferentem; the law shrewdly suspecting that every man will take care to guard his own interests.

This rule, however, is applicable only as a *last resource*, and in the case of a grant from the Crown is reversed altogether (*s*). Moreover, it would appear that the rule is not to be applied when it would work a wrong to a third person; *constructio legis non facit injuriam* (*t*). See also the recent case of *Stewart v. Merchants' Marine Insurance Co.* (1886), 16 Q. B. D. 619; 55 L. J. Q. B. 81.

Unless a different intention appears from the terms of the contract, *Time*. stipulations as to time of payment are not deemed to be of the essence of a contract of sale.

In a contract of sale, "month" means *primâ facie* calendar "Month." month (*u*).

(*p*) [1891] A. C. 401; 65 L. T. 502.

(*q*) (1860), 9 H. L. C. 114; 31 L. J. Ch. 269.

(*r*) (1859), 29 L. J. Ch. 9; 1 De G. F. & J. 33.

(*s*) *Eastern Archipelago Co. v.*

Reg. (1853), 2 E. & B. 856; 23 L. J. Q. B. 82.

(*t*) Per Sir Joseph Napier, *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 406; 38 L. J. P. C. 30.

(*u*) See 56 & 57 Vict. c. 71, s. 10.

Warranties, &c.

[56.]

LOPUS *v.* CHANDELOR. (1603)

[2 CROKE, 2.]

A jeweller sold a man a stone saying it was a bezoar, when it was not. It was held, however, that he was not liable *in contract* because his assertion did not amount to a warranty; nor *in tort* because he might have believed what he said.

Mere
affirmation
may be
warranty.

The probabilities are that if Lopus had been a litigant of to-day he would have succeeded on both points:—in *contract*, because “every *affirmation* at the time of the sale of a personal chattel is a *warranty* if it appear to have been intended as such,” and Chandelor’s assertion that the stone was a bezoar would no doubt be considered sufficient; and in *tort*, because the fact that the defendant was a jeweller would be damning evidence that he knew one stone from another.

“Warranty” is defined by sect. 62 of the Sale of Goods Act, 1893 (*x*), as “an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.”

Test to be
applied to
affirma-
tion.

It is often a difficult matter to decide whether the seller intended his representation to be a warranty or not. The test to determine his intention is, *did he assume to assert a fact of which the buyer was ignorant?* If he did, he warranted. Two well-known picture dealing cases illustrate this distinction. In one of them the seller, at the time of sale, gave the following bill of parcels:—

Power *v.*
Barham,
and Jend-
wine *v.*
Slade.

“Four pictures, *Views in Venice*, Canaletto, 1601.”

It was held that the jury might very well find that the words imported a *warranty* that Canaletto had painted the pictures (*y*). In the other case, a sea-piece and a fair had been sold, the former being catalogued as by Claude Lorraine, and the latter by Temiers.

(*x*) 56 & 57 Vict. c. 71.

(*y*) *Power v. Barham* (1836), 4 Ad. & E. 473; 6 N. & M. 62.

It was held that, as those artists had lived so long ago, it was impossible for anyone to be sure whether the pictures were by them or not; the seller could not be taken to have asserted *a fact*, but had merely expressed *his opinion* on the subject; therefore he had not warranted (z).

Difficult questions of construction frequently arise when a horse is sold with a warranty. In one case the receipt ran as follows:—

Questions
of con-
struction.

“Received of Mr. Budd 10l. for a grey four-year-old colt, warranted sound in every respect.”

It was held that this warranty referred only to the *soundness*, and that the *age* was mere matter of description (a). In another case the seller of a mare said “*he never warranted, he wouldn’t even warrant himself; but the mare was sound to the best of his knowledge.*” It was held that he must be taken to have warranted that the mare was *sound to the best of his knowledge* (b).

A general warranty does not extend to *obvious defects* (c). If I sell you a horse warranting that it is sound and perfect in every respect when both of us can see it has no tail, you cannot bring an action against me for breach of warranty on the ground of the missing appendage. If, however, the defect, though obvious, is yet not of a permanently injurious character, it will be covered by a general warranty. A man once sold a race-horse to a sporting attorney with a warranty of soundness, though the horse was obviously suffering from a splint. But some splints cause lameness and others do not, and, as it was uncertain what would be the result in this case, the warranty was held to extend to it. Moreover, however obvious a defect may be, if the seller agrees to deliver the horse all right at the end of a particular period, the warranty will include the defect (d). A person who takes a horse with a warranty—it has been held in a case where a man bought a horse with “an extraordinary convexity of the cornea of the eye” which produced short-sightedness and made the animal liable to shy,—is not bound to use extreme diligence in discovering defects (e).

Obvious
defects.

The seller may, of course, place limitations on the warranty he gives. At a horse repository, for instance, there was a notice on a board to the effect that warranties given at that establishment

Qualified
warranty.

(z) *Jendwine v. Slade* (1797, 2 Esp. 572.

(a) *Budd v. Fairmaner* (1831, 8 Bing. 48; 5 C. & P. 78.

(b) *Wood v. Smith* (1829, 5 M. & Ry. 124; 4 C. & P. 45. And see per Lord Cairns, *Ward v. Hobbs* (1878, 4 App. Cas. 13; 18

L. J. C. P. 281.

(c) *Margetson v. Wright* (1832), 8 Bing. 451; 5 M. & P. 606.

(d) *Liddard v. Kain* (1824), 2 Bing. 183; 9 Moore, 356.

(e) *Holliday v. Morgan* (1858), 1 E. & E. 1.

should remain in force only till twelve o'clock the next day unless in the meantime the purchaser sent in a certificate of unsoundness. It was held that purchasers who were aware of it were bound by this notice (*f*). A similar condition was held binding on the purchaser in the recent case of *Hinchcliffe v. Barwick* (*g*), where, however, there were no words limiting the duration of the warranty, but the horse was to be returned by a particular time the next day and then tried.

What is
soundness.

The term "sound" in the warranty of a horse or other animal implies the absence of any disease, or seeds of disease, which actually diminishes, or in its progress will diminish, its natural usefulness in the work to which it would properly and ordinarily be applied (*h*). A temporary lameness has been held to be unsoundness (*i*); so has a cough (*k*). But mere badness of shape is not unsoundness (*l*); nor is roaring, unless symptomatic of disease (*m*). Crib-biting is not unsoundness, but vice (*n*). A nerved horse is unsound (*o*). So is a chest-foundered horse (*p*).

Remedies
for breach
of war-
ranty.

A breach of warranty on the sale of a specific chattel does not entitle the buyer to reject and return the article. His remedy is either to sue the seller for damages, or to set off the breach when an action is brought against him for the price (*q*). If, however, the subject-matter of the sale is not in existence or not ascertained at the time of the contract, he may refuse to accept an article not in accordance with the description stipulated for. To entitle him, however, thus to return the goods and rescind the contract, he must be careful not to make any further use of them than is necessary to give them a fair trial. If the purchaser sues upon the warranty, he need not return the article sold (*r*). See also the recent case of *Wagstaff v. Shorthorn Dairy Co.* (*s*), where there was a sale of seed potatoes, and the potatoes were not up to the standard of the warranty. It was held that the purchaser was entitled to

(*f*) *Bywater v. Richardson* (1834), 1 Ad. & E. 508; 3 N. & M. 748.

(*g*) (1880), 5 Ex. Div. 177; 49 L. J. Ex. 495; and see *Chapman v. Withers* (1888), 20 Q. B. D. 824; 57 L. J. Q. B. 457.

(*h*) *Kiddell v. Burnard* (1842), 9 M. & W. 668.

(*i*) *Elton v. Brogden* (1815), 4 Camp. 281.

(*k*) *Coates v. Stephens* (1838), 2 M. & Rob. 157.

(*l*) *Dickinson v. Follett* (1833), 1 M. & Rob. 299.

(*m*) *Bassett v. Collis* (1810), 2 Camp. 524. See, however, *Onslow*

v. Eames (1817), 2 Stark. 81.

(*n*) *Scholefield v. Robb* (1839), 2 M. & Rob. 210.

(*o*) *Best v. Osborne* (1825), Ry. & M. 290; 2 C. & P. 74.

(*p*) *Atterbury v. Fairmanner* (1823), 8 Moore, 32.

(*q*) *Street v. Blay* (1831), 2 B. & Ad. 456. And see sect. 53 of the Sale of Goods Act, 1893.

(*r*) *Fielder v. Starkin* (1788), 1 H. Bl. 17; *Pateshall v. Tranter* (1835), 3 Ad. & E. 103; 4 N. & M. 649.

(*s*) (1884), 1 C. & E. 324.

the difference in value between the crop actually produced and the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination.

Warranty must be during Treaty for Sale.

HOPKINS v. TANQUERAY. (1854)

[57.]

[15 C. B. 130; 23 L. J. C. P. 162.]

Mr. Tanqueray advertised his horse "California" for sale at Tattersall's. The day before the sale, happening to go there, he found his friend Hopkins kneeling down and carefully scrutinizing "California's" legs, whereupon he remarked, "*My dear fellow, you needn't examine his legs; you have nothing to look for; I assure you he's perfectly sound in every respect;*" to which Hopkins replied, "If you say so, I am perfectly satisfied," and immediately got up. The next day Hopkins attended the sale, and bought the horse, having, as he said, determined to do so because of Tanqueray's positive assurance that he was sound. There was no written warranty, and it was admitted that when Tanqueray said the horse was sound he quite believed it was. Hopkins now sought to make out that Tanqueray's assertion on the day before the sale was equivalent to a warranty. It was held, however, that that assertion *formed no part of the contract of sale*, and therefore did *not* amount to a warranty.

The plaintiff made no imputation of *fraud* here. He sued *in contract, not in tort*, his point being that, notwithstanding the reticence of the auctioneer at the time the horse was put up, what the defendant had said to him *on the day before the sale* amounted to a warranty. But a warranty must be given, if at all, *at the time*

Previous representations cannot be relied on as a warranty.

of the sale. Representations and assertions made *before* it, unless continuing, or bottomed in fraud, are no good (*t*).

Warranty given afterwards requires new consideration.

Horse dealing.

Oral representations cancelled by written contract.

Allen *v.* Pink.

So, too, a warranty given *after* a sale is void unless there is a new consideration; for the first consideration is exhausted by the transfer of the chattel without a warranty (*u*). "It frequently happens that persons (not lawyers) hardly consider this: they quote all the seller or dealer says as he buttons up the cheque in his pocket, as if that could in any way be a warranty. Some dealers and horse-sellers say all sorts of things when coping or selling a horse, but they confine themselves to puff, and never commit themselves to any statement of a fact as to the subject of the deal. It is not until the bargain is entirely over that they comfort the buyer by statements which he fondly looks upon as warranties, but which cannot be so considered" (*x*). When the terms of a contract have been reduced into writing, no oral representations can be relied on as a warranty. The written contract shortens and corrects the representations, so that whatever terms are not contained in the document must be struck out of the transaction (*y*). But a mere memorandum, not intended to be final, will not exclude oral evidence of a warranty. Thus, in *Allen v. Pink* (*z*), where a paper was signed by the vendor and given to the vendee containing "*Bought of G. Pink a horse for the sum of 7l. 2s. 6d.*," it was held that evidence might be given of a contemporaneous warranty. "The general principle stated by Mr. Byles," said Lord Abinger, C.B., "is quite true, that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract. But the principle does not apply here. There was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant. The contract is first concluded by parol, and afterwards the paper is drawn up which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself."

(*t*) See *Ormrod v. Huth* (1845), 14 M. & W. 651; 14 L. J. Ex. 366. See also *Cowdy v. Thomas* (1877), 36 L. T. N. S. 22.

(*u*) *Roscorla v. Thomas* (1842), 3 Q. B. 234; 2 G. & D. 508.

(*x*) Lascelles on Horse Warranty (2nd ed.), p. 34.

(*y*) *Pickering v. Dowson* (1813), 4 Taunt. 779.

(*z*) (1838), 4 M. & W. 140; 1 H. & H. 207.

*Implied Warranty of Title.*MORLEY *v.* ATTENBOROUGH. (1849)

[58.]

[3 EXCH. 500; 18 L. J. Ex. 148.]

The defendant in this case was the well-known pawnbroker of that name. A person named Poley having hired a harp of Messrs. Chappell, music sellers, pledged it with the defendant for 15*l.* 15*s.* on the terms that if the sum advanced were not repaid within six months he should be at liberty to sell it. The harp not being redeemed within the stipulated time, Attenborough sold it to the plaintiff. All this came to the ears of Messrs. Chappell, who got back their harp from Morley; and that gentleman, to recoup himself, now brought an action against the pawnbroker, alleging that the harp was sold to him with an implied warranty of title. This view, however, did not prevail, for the judges decided that in the absence of an express warranty all that the pawnbroker asserted by his offer to sell was that the thing had been pledged to him and was unredeemed, not that he was the lawful owner.

The leading case (which was followed in *Bagueley v. Hawley*) (a) was the chief authority for the supposed rule that *on the sale of a chattel personal there is no implied warranty of title*. The rule, however, was said to be pretty well "eaten up by the exceptions" (b). For example, the sale of goods *in a shop, or in a warehouse*, was held to import an implied warranty of title; and, indeed, Mr. Benjamin, in his book on the Sale of Personal Property, went so far as to state the effect of *Eicholtz v. Bannister* (c) (where a Manchester job warehouseman in his warehouse sold the plaintiff a quantity of woollen goods which he described as "a job lot just received by

Rule
hardly
really
exists.

Eicholtz v.
Bannister.

(a) (1867), L. R. 2 C. P. 625; 36 L. J. C. P. 328.

(b) Per Lord Campbell in *Sims v. Marryat* (1851), 17 Q. B. 291.

(c) (1864), 17 C. B. N. S. 708; 34 L. J. C. P. 195. See also the

recent case of *Raphael v. Burt* (1884), 1 C. & E. 325, where there was held to be an implied warranty of title on the sale of some American bonds, which turned out to have been stolen.

him") to be that "*the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold*" (*d*). And this view of the law has now been adopted in the Sale of Goods Act, 1893 (*e*), s. 12, which provides that:—"In a contract of sale, *unless the circumstances of the contract are such as to show a different intention*, there is—

- (1.) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass:
- (2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (3.) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

As to what circumstances are such as "to show a different intention," reference should be made (in addition to *Morley v. Attenborough*, and *Baguley v. Hawley*, *supra*) to *Chapman v. Speller* (*f*), where it was held that on the sale of a forfeited pledge by a pawn-broker, the seller must be considered as undertaking merely that the subject of sale is a pledge, and is irredeemable, and that he *does not know* of any defect of title. A "different intention" may also be inferred from the nature of the subject-matter sold, *e.g.*, a patent right (*g*). And it should be observed that the implied condition and warranties arising under the above section may be negated or varied not only by the circumstances, but also by the terms, express or implied, of the contract, under sect. 55 of the same Act, which provides that "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract." The effect of this latter section is to preserve intact the general principles and rules of construction applicable to contracts, and concisely expressed in the three maxims, "*modus et conventio vincunt legem*"; "*expressum facit cessare tacitum*"; "*in contractis tacite insunt que sunt moris et consuetudinis*."

(*d*) *Benj. Sale of P. P.* (4th ed.), p. 634.

(*e*) 56 & 57 Vict. c. 71.

(*f*) (1855), 14 Q. B. 621; 19 L. J. Q. B. 239. See also *Peto v.*

Blades (1814), 5 Taunt. 657.

(*g*) *Hall v. Conder* (1857), 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288; *Smith v. Neale* (1857), 2 C. B. N. S. 67; 26 L. J. C. P. 113.

Implied Warranties.

JONES v. JUST. (1868)

[59.]

[L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.]

Jones and Co., Liverpool merchants, agreed to buy from Mr. Just, a London merchant, a number of bales of Manilla hemp which were expected to arrive in some ships from Singapore. The hemp did arrive, but, when it was examined, it was found to be so much damaged that it would not pass in the market as Manilla hemp; and Jones and Co., who had paid the price before the ships arrived, had to sell it at 75 per cent. of the price which similar hemp would have realised if undamaged. This was an action by them against the seller, who was admitted to have acted quite innocently in the matter, to recover the difference; and it was held that he must pay it, on the ground that in every contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only correspond to the specified description, but *must also be saleable or merchantable under that description.*

The maxim *caveat emptor* generally applies as to the quality of goods sold, and, unless there is an *express* warranty, there is none. *Caveat emptor.*

But a warranty is *implied* in the following cases:—

(1.) When goods are sold by a trader *for a particular purpose* of which he is well aware—*e. g.*, copper for sheathing a ship,—so that the buyer necessarily trusts to the judgment or skill of the seller, they must be reasonably fit for the purpose (*h*). *Particular purpose.*

A case often referred to is *Bigge v. Parkinson* (*i*), where a provi- *Bigge v. Parkinson.*

(*h*) *Jones v. Bright* (1829), 5 Bing. 533; 3 M. & P. 155; *Gray v. Cox* (1825), 4 B. & C. 108; 8 D. & R. 220. See sect. 14 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and note the proviso that “in the case of a contract for

the sale of a specified article *under its patent or other trade name*, there is no implied condition as to its fitness for any particular purpose.”

(*i*) 1832, 7 H. & N. 955; 31 L. J. Ex. 301.

sion dealer had undertaken to supply a troop-ship with stores for a voyage to Bombay, guaranteed to pass the survey of certain officers, but with no warranty of their being fit for the purpose. It was held, however (in spite of the guarantee), that such a warranty must be implied.

Food. But in the case of the sale of meat in a market, which the buyer inspects and selects himself, there is no implied warranty of fitness for human food (*k*). The butcher, however, might be liable in tort to the customer if the bad meat made him ill (*l*).

The implied warranty of this class covers latent undiscoverable defects (*m*).

Manufactured goods. (2.) When the contract is to furnish *manufactured goods*, they must be of a merchantable quality (*n*).

Mody v. Gregson. And this is so *even when the sale is by sample*. Grey shirtings were delivered according to sample, but it was then discovered that 15 per cent. of china clay had been introduced into the fabric, rendering it unmerchantable. The presence of the china clay could not have been detected by an ordinary examination of the sample; and it was therefore held that an action could be maintained for breach of an implied warranty of merchantable quality (*o*).

Johnson v. Raylton. In the absence of usage, there is an implied contract by a manufacturer who sells goods that they are of *his own make*; so that he would not be justified in supplying equally excellent articles made by some other manufacturer (*p*).

Sample. (3.) In the case of a *sale by sample*, there is an implied condition that (a) the bulk shall correspond with the sample in quality; (b) the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (*q*).

Parkinson v. Lee. But no further warranty (unless it would have arisen if the sale had not been by sample) is implied. In the well-known case of

(*k*) *Emmerton v. Matthews* (1862), 7 H. & N. 586; 31 L. J. Ex. 139; *Smith v. Baker* (1879), 40 L. T. 260.

(*l*) *Burnby v. Bollett* (1847), 16 M. & W. 644; 17 L. J. Ex. 190.

(*m*) *Randall v. Newson* (1877), 2 Q. B. D. 102; 45 L. J. Q. B. 364.

(*n*) *Laing v. Fidgeon* (1815), 6 Taunt. 108; 4 Camp. 169.

(*o*) *Mody v. Gregson* (1868), L. R. 4 Ex. 49; 38 L. J. Ex. 12; and see *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438; 41 L. J. C. P.

228; *Drummond v. Van Ingen* (1887), 12 App. Cas. 284; 56 L. J. Q. B. 563; *Jones v. Padgett* (1890), 24 Q. B. D. 650; 59 L. J. Q. B. 261.

(*p*) *Johnson v. Raylton* (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 753. See, however, the dissentient judgment of Bramwell, L.J.

(*q*) Sale of Goods Act, 1893, s. 15 (2). A contract of sale is a contract for sale by sample, where there is a term in the contract, express or implied, to that effect.

Parkinson v. Lee (r) the defendant sold the plaintiff a quantity of hops by sample. The bulk fairly answered to the sample, but both sample and bulk had a latent defect which made the purchase useless to the plaintiff. It was held that there was no implied warranty that the hops were merchantable or good for anything. "Here," said Lawrence, J., "was a commodity offered for sale, which might or might not have a latent defect. This was well known in the trade; and the plaintiff might, if he pleased, have provided against the risk by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it."

(4.) The *custom* of a particular trade may raise an implied Custom. warranty (s).

(5.) Under the circumstances of the leading case, that is to say, where goods are sold by *description*, there is an implied condition, Sale by description. not only that they answer the description, but that they are of merchantable quality; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description (t). But if the buyer has examined the goods, there is then no implied condition as regards defects which such examination ought to have revealed (u).

But it is not an implied term in the contract that the thing sold shall be fit for the purpose for which it is required (x).

(6.) By the 17th section of the Merchandise Marks Act, 1887 (y), Trade Marks. a warranty of genuineness is to be implied from a trade-mark or description.

(7.) By the Fertilisers and Feeding Stuffs Act, 1893 (z), the Fertilisers and feeding stuffs. invoice which the seller of manufactured or artificially prepared fertilisers or feeding stuffs is now bound to give to the purchaser, is declared to have effect as a warranty of the statements contained therein, and also on the sale of any article for use as food for cattle there is implied a warranty by the seller that the article is suitable for feeding purposes.

As to implied warranties on the letting of land or houses, see *Smith v. Marrable*, *post*, p. 198.

One or two recent cases on implied warranty may just be mentioned in passing.

(r) (1802), 2 East, 314.

(s) *Jones v. Bowden* (1813), 4 Taunt. 817. And see ss. 14 and 55 of the Sale of Goods Act, 1893.

(t) See the Sale of Goods Act, 1893, ss. 13 and 14.

(u) *Ib.* s. 14 (2).

(x) *Chanter v. Hopkins* (1838), 4 M. & W. 406; 1 H. & H. 377; *Ollivant v. Bayley* (1843), 5 Q. B. 288; 13 L. J. Q. B. 34.

(y) 50 & 51 Vict. c. 28.

(z) 56 & 57 Vict. c. 56, ss. 1 and 2.

Blackfriars Bridge. In 1864 the Corporation of London wanted to take down Blackfriars Bridge, and build a new one. Accordingly, they prepared plans and a specification, and invited tenders. A Mr. Thorn contracted to do the work and set about it. But when he had got some way, it turned out that a part of the plan, which consisted in the use of caissons, could not be adopted, and finally Thorn found it necessary to go to law with the corporation for the loss of time and trouble occasioned by the failure of the caissons. It was held, however, that there was no implied warranty that the bridge could be built according to the plans and specification (*a*).

Longer voyage than expected. In another case, the plaintiff, a master mariner, had agreed with the defendants for a lump sum to take a certain specified steam-tug of theirs, towing six barges, from Hull to the Brazils, he paying the crew and providing food for all on board for seventy days. It was held that there was no implied undertaking by the defendants that their steam-tug was reasonably efficient for the purposes of the voyage, and that the master mariner had no remedy against them, though it turned out that the engines of the vessel were so defective that the voyage occupied a great deal more time than it ought to have done (*b*). See also the recent case of *Hall v. Billingham* (*c*), where it was held (under 37 & 38 Vict. c. 51, s. 4) that in every case of a contract for the sale of a chain cable, whether for use on a British ship or not, there is an implied warranty that it has been properly tested and stamped.

Chain cables.

Warranties and Representations.

[60.]

BEHN *v.* BURNESSE. (1863)

[3 B. & S. 751; 32 L. J. Q. B. 204.]

This was an action by a shipowner against a charterer for not loading. In the charter-party the plaintiff had described himself as "owner of the good ship or vessel called the *Martaban*, of 420 tons or thereabouts, *now in the*

(*a*) *Thorn v. London* (1876), 1 L. J. Q. B. 68.

App. Cas. 120; 45 L. J. Ex. 487.

(*b*) *Robertson v. Amazon, &c.* Co. (1881), 7 Q. B. D. 598; 51

(*c*) (1885), 34 W. R. 122; 54

L. T. 387.

port of Amsterdam." Unfortunately, the good ship the *Martaban* was *not* just then "in the port of Amsterdam"; and the question was whether the words were a condition or merely a representation. It was held that they were a condition precedent, and therefore that the plaintiff had not fulfilled his part of the contract.

In the judgment in the leading case, representations are defined as "statements or assertions made by the one party to the other, before or at the time of the contract, of some matter or circumstance relating to it." Now it is clear law(*d*) that an action of deceit will lie when the plaintiff has been induced to enter into a contract by representations of the defendant which were false in fact and which were also false to the knowledge of the defendant, or were recklessly made by him. But if a person is induced to enter into a contract by a false statement carelessly made by one who honestly believes it to be true, the validity of the contract can be impeached only if it is made a *condition* of the contract(*e*). If it is so made a condition, the contract, being conditional upon its truth, cannot, of course, be enforced by the party from whom the untrue statement proceeded. This observation may be well illustrated by considering the important case of *Bannerman v. White*(*f*), an action by a hop-grower against a hop-merchant for the price of hops sold to the latter. The Burton brewers, rightly or wrongly, considered that the quality of their beer had deteriorated through the employment of sulphur in the cultivation of hops, and had the year before sent a circular round to all the growers saying that they would not buy any more hops which had had sulphur applied to them. This being so, at the very commencement of the negotiations between the plaintiff and the defendant, the latter asked the former if any sulphur had been used, adding that, if any had, he must decline to consider any offer. The plaintiff replied that none had been used, and so the defendant agreed to purchase the year's crop. As a matter of fact, the plaintiff had used sulphur to about five acres of the hops (the whole growth being 300 acres), having done so for the purpose of trying a new machine called a sulphurator; and had afterwards mixed the sulphured and unsulphured hops all up together. It may be taken that there was no fraudulent intention on the part of the plaintiff. The effect of the

Definition
of repre-
sentations.

What
amounts
to a con-
dition.

Banner-
man *v.*
White.

(*d*) See per Jessel, M. R., Smith *v.* Chadwick (1884), 20 Ch. D. 27, at p. 44; 9 App. Cas. 187; 53 L. J. Ch. 873.

(*e*) See Peck *v.* Derry (1890), 11

App. Cas. 337; 58 L. J. Ch. 864. But see *Angus v. Clifford*, [1891] 2 Ch. 449; 60 L. J. Ch. 443.

(*f*) (1861), 10 C. B. N. S. 814; 31 L. J. C. P. 28.

finding of the jury was that the defendant required and the plaintiff gave his undertaking that no sulphur had been used. "This undertaking," said Erle, C. J., in delivering the decision of the Court, "was a preliminary stipulation, and if it had not been given, the defendant would not have gone on with the treaty which resulted in the sale. In this sense *it was the condition upon which the defendant contracted.*" It was held, therefore, that, as the plaintiff had not fulfilled the condition, he could not enforce the sale.

Represent-
ation
amounting
to war-
ranty.

But it may be, too, that a representation is of such a nature and made under such circumstances as to amount to a *warranty*. And this is a very different thing from a *condition* in the strict legal meaning of the term, although no doubt some confusion has arisen from a careless interchange of the two words. A *warranty*, though part of the contract, is really in itself *a separate and distinct undertaking* that a particular representation shall be true, and, if in the end it proves to be untrue, the remedy is for breach of this agreement of warranty, so that the original contract is not thereby avoided as it would be on the non-performance of a *condition*.

Sale of
Goods Act,
1893, s. 11.

And, "where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or *may elect to treat the breach of such condition as a breach of warranty*, and not as a ground for treating the contract as repudiated" (*g*).

"Whether a stipulation in a contract of sale is a *condition*, the breach of which may give rise to a right to treat the contract as repudiated, or a *warranty*, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation *may be a condition though called a warranty* in the contract" (*h*).

Bentson v.
Taylor.

The recent case of *Bentson v. Taylor*(*i*) is an excellent illustration of the law discussed in *Behn v. Burness*; and the following extract from the judgment of Bowen, L. J., deserves the most careful attention:—"When a contract is entered into between two parties, every representation made at the time of the entering into the contract may or may not be intended as a warranty, or as a promise that the representation is true. When the representation is not contained in the written document itself, it is for the jury to say whether the real representation amounted to a warranty. . . . But, when you have a representation made in a written document, it is obviously no longer for the jury, but for the Court, to decide

(*g*) Sale of Goods Act, 1893
(56 & 57 Viet. c. 71), s. 11 (1) (a).

(*h*) *Ib.* s. 11 (1) (b).

(*i*) [1893] 2 Q. B. 274; 63 L. J.
Q. B. 15.

whether it is a mere representation, or whether it is what is called (I admit not very happily) a ‘substantive part of the contract,’ that is, a part of the contract which involves a promise in itself. It might be necessary to take the opinion of the jury on matters of fact which would throw light on the construction, but the question of construction itself would remain until the end of the case for the Court to decide. But, assuming the Court to be of opinion that the statement made amounts to a promise, or, in other words, a substantive part of the contract, it still remains to be decided by the Court, as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract. . . . There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one’s mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which, the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. There, again, it might be necessary to have recourse to the jury.”

There exists, too, a large class of cases in which relief is given on equitable grounds to persons induced to enter into agreements on the faith of innocent misrepresentations. These are cases in which one party to the contract has, from the nature of the transaction, special and peculiar means of knowledge (*k*) as to the subject-matter from which the other party is excluded, *e.g.* (*l*), agreements for the sale of landed property (*m*), or contracts for marine insurance. In many instances of this kind, the mere omission to state material facts is in itself sufficient to enable the deceived party to release himself from his obligation.

Relief on equitable grounds.

(*k*) As to the case where plaintiff had means of discovering that the representation was untrue, see *Redgrave v. Hurd* (1881), 20 Ch. D. 1; 51 L. J. Ch. 113.

(*l*) *Phillips v. Caldwell* (1868), L. R. 4 Q. B. 159; 38 L. J. Q. B. 68.

(*m*) *Proudfoot v. Montefiore* (1867), L. R. 2 Q. B. 511; 36 L. J. Q. B. 225.

Implied Warranty on letting Furnished House.

[61.]

SMITH v. MARRABLE. (1843)

[11 M. & W. 5; 12 L. J. Ex. 223.]

“5, Brunswick Place, Sept. 19, 1842.

“*Lady Marrable informs Mrs. Smith that it is her determination to leave the house in Brunswick Place as soon as she can take another, paying a week’s rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain.*”

And in pursuance of this determination, the Marrables moved out, and Smith went to law with them, alleging that as they had taken the house for five weeks they had no business to leave in this summary fashion, bugs or no bugs. The Marrables, on the other hand, successfully contended that *it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation*, and that, if it is not fit, the tenant may quit without notice.

The famous bug case, after having been disrespectfully spoken of for many years, was in 1877 expressly affirmed by the case of *Wilson v. Finch Hatton*(*u*), where its principle was applied to defective drainage.

Exception
to rule.

It is to be observed that it is only in the case of *furnished* houses that reasonable fitness is an implied condition. In general, in the absence of deceit, there is no such implied condition by the lessor of land or houses(*o*), nor that he will do any repairs(*p*), nor even that the house will endure during the term. See, however, the 12th section of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), with regard to houses let for habitation by persons of the working classes at a low rent(*g*). In the case of

Attempts

(*u*) (1877), 2 Ex. Div. 336; 46 L. J. Ex. 489.

(*o*) *Keates v. Cadogan* (1851), 10 C. B. 591; 20 L. J. C. P. 76.

(*p*) *Gott v. Candy* (1853), 2 E. & B. 847; 23 L. J. Q. B. 1.

(*g*) *Walker v. Hobbs* (1889), 23 Q. B. D. 458; 38 W. R. 63.

Manchester Bonded Warehouse Co. *v.* Carr (*r*), where a building had fallen in consequence of a floor being overloaded with flour, and rent was claimed by the lessors during the time the building was unoccupied, the Court said distinctly, "We are not prepared to extend these decisions [*viz.*, *Smith v. Marrable*, and *Wilson v. Finch Hatton*] to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty." Another attempt to extend the liabilities of landlords was made in *Anderson v. Oppenheimer* (*s*), where the tenant of the ground floor and basement of a house in Cannon Street, let out in flats to different tenants, tried unsuccessfully to get damages under a *covenant for quiet enjoyment* for the bursting of a water pipe and consequent injury to his goods. In *Powell v. Chester* (*t*) the grievance was that there was an insufficient water supply, but Bacon, V.-C., declined to apply the principle of *Smith v. Marrable* to the facts of the case. Indeed his judgment shows a disposition to limit the application of the principle as much as possible. And this disposition was re-affirmed by the Court of Appeal in the very recent case of *Sarson v. Roberts* (*u*), where it was held that on the letting of furnished lodgings there is *no implied warranty that the lodgings shall continue fit for habitation during the term*.

It may be mentioned that when the lessor has covenanted to keep the demised premises in repair during the term, he is entitled to *notice of want of repair* (*v*). It has been held that under a covenant to keep the demised premises in repair the lessor is not bound to *cleanse an ornamental piece of water* in the grounds (*x*). And even when the landlord is bound to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done (*y*); nor may he do them himself and deduct the amount from his rent (*z*).

(*r*) (1880), 5 C. P. D. 507; 49 L. J. C. P. 809.

(*s*) (1880), 5 Q. B. D. 602; 49 L. J. Q. B. 708.

(*t*) (1885), 52 L. T. 722; *Hugall v. McLean* (1885), 53 L. T. 94; 33 W. R. 588.

(*u*) [1895] 2 Q. B. 395; 73 L. T. 174.

(*v*) *Makin v. Watkinson* (1870), L. R. 6 Ex. 25; 40 L. J. Ex. 33.

(*x*) *Bird v. Elwes* (1868), L. R. 3 Ex. 255; 37 L. J. Ex. 91.

(*y*) *Surplice v. Farnsworth* (1844), 7 M. & G. 576; 13 L. J. C. P. 215.

(*z*) *Weigall v. Waters* (1795), 6 T. R. 488.

to increase liabilities of landlords.

Covenant by landlord to repair.

Life Insurance.

[62.]

HEBDON *v.* WEST. (1863)

[3 B. & S. 579; 32 L. J. Q. B. 85.]

This was an action against an insurance society. The plaintiff had been for many years a clerk in a bank at Preston, and had proved very useful to his employers, of whom a gentleman named Pedder was the senior and managing partner. Pedder was much pleased with the man, and promised him two things,—one, that he would not, during his life, enforce payment of a debt of 4,000*l.* or 5,000*l.* which Hebdon owed the bank, and the other, that he would pay him an increased salary of 600*l.* a year during the next seven years. Careful man that he was, Hebdon obtained Pedder's permission to insure the latter's life in respect of these promises, and the chief question now was whether the insured had such a pecuniary interest in Pedder's life as to satisfy 14 Geo. III. c. 48. It was held that in respect of the 600*l.* a year salary he had, but not in respect of the other promise. It was held also that *a person cannot recover from an insurance company more than the amount of his insurable interest in the life of the person insured.*

[63.]

DALBY *v.* INDIA AND LONDON LIFE
INSURANCE CO. (1854)

[15 C. B. 365; 24 L. J. C. P. 1.]

The effect of this case is to overrule *Godsall v. Boldero* (*a*), and to decide that *a contract of life insurance is not, like that of fire or marine insurance, a contract of indemnity merely,*

(*a*) (1807), 9 East, 72. See some interesting remarks of Lord Blackburn on this case in *Burnand v.*

Rodocanachi (1882), 7 App. Cas. 333, at p. 440; 51 L. J. Q. B. 548.

but entitles the assured to receive the exact sum for which he has insured, no matter how much in excess of his real loss it may be.

14 Geo. III. c. 48, s. 1, provides that no insurance shall be made by any person on the life of another, unless the person for whose sake the policy is made has *an interest* in that life. Necessity for "interest."

What then is an "interest"? (*b*).

In the first place, a man is presumed to have an interest in his own life. But, on the other hand, if it can be shown that he is insuring his life with another person's money, and for that other's benefit, the policy will be void, for it is then nothing better than an attempt to evade the statute (*c*). A creditor may insure his debtor's life, and, even though the debt is afterwards paid, may recover the money from the insurance office (*d*). A *cestui que trust* may insure the life of his trustee (*e*), and a wife her husband's (*f*). A husband is not presumed to have such an interest in his wife's life. The "Married Women's Property Act, 1882" (*g*), gives power to a married woman to effect a policy on her own or her husband's life for her separate use, and provides that, if a husband insures his life in a policy expressed on the face of it to be for the benefit of his family, it shall create a trust for them. In the recent case of *Cleaver v. Mutual Reserve Fund* (*h*), a husband having insured his life for the benefit of his wife, died, and his wife was convicted of his murder. It was held, that the effect of sect. 11 of the above Act was to create a trust in favour of the wife in respect of the sum insured, but that, inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, and a resulting trust arose in favour of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company. But, generally, the interest required by the statute is a *pecuniary* interest (*i*); and therefore an insurance by a father in his own Who has "interest."
Creditor.
Cestui que trust.
Husband and wife.
Murderer cannot take benefit.
Father.

(*b*) *Lucena v. Crawford* (1808), 2 N. R. 302; *Wilson v. Jones* (1867), L. R. 2 Ex. 139; 36 L. J. Ex. 78.

(*c*) *Wainwright v. Bland* (1836), 1 M. & W. 32; 5 L. J. Ex. 147; *Shilling v. Accidental Death Ins. Co.* (1837), 2 H. & N. 42; 27 L. J. Ex. 17.

(*d*) *Anderson v. Edie*, 2 Park, Ins. 914 (8th ed.).

(*e*) *Collett v. Morrison* (1851), 9 Hare, 162; 21 L. J. Ch. 878.

(*f*) *Reed v. Roy*. Exch. Co. (1796), Peake Add. Ca. 70.

(*g*) 45 & 46 Viet. c. 75, s. 11, re-enacting 33 & 34 Viet. c. 93, s. 10, and see as to this *In re Soutar's Policy Trust* (1884), 26 Ch. D. 236; 54 L. J. Ch. 256.

(*h*) [1892] 1 Q. B. 147; 61 L. J. Q. B. 128.

(*i*) See *Barnes v. London, Edinburgh and Glasgow Assur. Co.*, [1892] 1 Q. B. 864.

name on the life of his son, he having no pecuniary interest in the continuance of it, is void (*k*).

Name. The name of the party interested must be inserted in the policy (*l*).
Time at which interest must exist. The time at which the required interest must exist is *the time of the entering into the contract*. It may have ceased at the time of the death, but the insurance office will nevertheless be bound to pay the money, for, as already stated, life insurance is not a mere contract of indemnity. But, as we have also seen already, a man cannot recover more than the amount of his insurable interest at the time of the contract. He could not, for instance, insure with half a dozen different offices and recover the money from all of them. This is the effect of the construction placed by *Hebdon v. West* on sect. 3 of 14 Geo. III. c. 48.

Assignment of life policy. A life policy may be assigned, either by indorsement or by a separate instrument, and the assignee may sue in his own name without showing any interest of his own; but a written notice of the assignment must be given to the insurance company (*m*). In the recent case of *Newman v. Newman* (*n*), it was held that the Act which requires this notice is intended to apply only as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons *inter se*; so that where a first incumbrancer on a policy had not given such notice as prescribed by the Act, and a second incumbrancer with notice of the prior charge had given the statutory notice, it was held that the second incumbrancer did not thereby obtain priority.

Construction of policies. The recent case of *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association* (*o*), may be referred to on the construction of policies of life insurance. The plaintiffs, a tramway company, effected with the defendants an insurance against "claims for personal injury in respect of accidents caused by vehicles, for twelve calendar months from November 24, 1887," to the amount of "£250 in respect of any one accident." On November 24, 1888, one of the plaintiffs' tramcars was overturned, forty persons were injured, and the plaintiffs became liable to pay claims to the amount of £833. The Court decided, first, that the policy excluded November 24, 1887, but included November 24, 1888;

(*k*) *Halford v. Kymer* (1830), 10 B. & C. 724.

(*l*) 14 Geo. III. c. 48, s. 2. As to whether an insurance against disease is a "policy" within this Act, see *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(*m*) 30 & 31 Vict. c. 144. See also 51 Vict. c. 8, s. 19, which provides

that an assignment must be duly stamped before the assurer can pay any claim arising under it.

(*n*) (1885), 28 Ch. D. 674; 54 L. J. Ch. 598.

(*o*) [1891] 1 Q. B. 402; 60 L. J. Q. B. 47, 260. And see *Hamlyn v. Crown Accidental Ins. Co.*, [1893] 1 Q. B. 750; 62 L. J. Q. B. 409.

and, secondly, that "accident" meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to £250; and therefore the plaintiffs were entitled to recover the amount of £833.

A person insuring his life has usually to answer a number of questions as to the state of his health, the illnesses he has had, &c. If it is made a condition of the policy that those questions shall be answered truly, the policy will become void even for immaterial and unintentional errors (*p*). In that case the truth of the declarations is the basis of the policy. If there is no such condition, the question is whether the concealment or misrepresentation was of a material fact (*q*). See Grogan's case (1885), 53 L. T. 761.

People who insure their lives should be a great deal more careful than they are to look at the conditions of a policy before signing it. Most people, it is believed, would enter into such a contract without noticing that they were never to play a game at lawn-tennis, or run over to Paris for a few days, or join the volunteers, or the Salvation Army, without the leave of the office. A common condition in a policy is that it shall become void in the event of the insured committing suicide. As such a condition (according to the more accepted opinion) covers suicide while in a state of insanity (*r*), and as insanity is a disease from which even the most gifted are not exempt, any more than they are from colds or fevers, a wise man will draw his pen through it.

This branch of the subject is well illustrated by the recent cases of Winspear *v.* Accident Insurance Co. (*s*), and Lawrence *v.* Accidental Insurance Co. (*t*). In the former case a man had effected an insurance against death by accidental injury, but the policy contained a proviso that the insurance should not extend "*to any injury caused by or arising from natural disease or weakness or exhaustion consequent on disease.*" During the time this policy was in force, the insured, whilst crossing the river at Edgbaston, was seized with an epileptic fit, and fell into the water and was drowned.

Winspear's case.

(*p*) Anderson *v.* Fitzgerald (1853), 4 H. L. C. 507; 17 Jur. 995; Thomson *v.* Weems (1884), 9 App. Cas. 671; 21 Sc. L. R. 791; London Guarantee Co. *v.* Fearnley (1880), 5 App. Cas. 911; 43 L. T. 390.

(*q*) London Assurance Co. *v.* Mansel (1879), 11 Ch. D. 363; 48 L. J. Ch. 331.

(*r*) Clift *v.* Schwabe (1846), 3 C. B. 437; 17 L. J. C. P. 2; and see Borradaile *v.* Hunter (1843), 5 M. & G. 639; 12 L. J. C. P. 225. See

also Horn *v.* Anglo-Australian Life Assurance Co. (1861), 30 L. J. Ch. 511; 4 L. T. 143; Dufaur *v.* Professional Life Co. (1858), 25 Beav. 602; 27 L. J. Ch. 817.

(*s*) (1880), 6 Q. B. D. 42; 43 L. T. 459; and see Bawden *v.* London, Edinburgh and Glasgow Ass. Co., [1892] 2 Q. B. 531; 61 L. J. Q. B. 792.

(*t*) (1881), 7 Q. B. D. 216; 50 L. J. Q. B. 522.

Law-
rence's
case.

It was held that the executrix could recover on the policy, in spite of the proviso. In the other case, a man who had effected a policy with much the same kind of proviso was taken ill on the platform at Waterloo, and fell in a fit on to the line, where an engine passed over and killed him. On the authority of Winspear's case, it was held that the insurance company were not protected by their proviso. "We must look," said Watkin Williams, J., "at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for, if he had never been born, the accident would not have happened." These two cases should, however, be compared with the recent case of *Isitt v. Railway Passengers' Assurance Co.* (*u*), where a person who had died from pneumonia, owing to cold caught while confined in his room, by an "injury caused by accident," and who was more liable to catch cold and less capable of resisting illness through debility resulting from the accident, was held to have died from "the effects of such injury."

Isitt's case.

Independently of conditions, a policy is vitiated by felonious suicide, being killed in a duel, or being executed (*v*); as also by fraudulent misrepresentation or concealment of material facts at the time of effecting the policy.

Premiums
not paid.

If the premium is not paid in the stipulated manner, the policy will become void. By receiving premiums, however, with full knowledge of the breach, the insurers will be deemed to have waived the forfeiture (*y*).

Leslie v.
French.

In *Leslie v. French* (*z*), it was held that when a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases:—

- (1.) By contract with the beneficial owner.
- (2.) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation.
- (3.) By subrogation to their right of some person who at the

(*u*) (1889), 22 Q. B. D. 504; 58 L. J. Q. B. 191.

(*v*) *Amicable Society v. Bolland* (1830), 2 Dow. & Cl. 1; 4 Bligh, N. S. 194. See also *Cornish v. Accident Insurance Co.* (1889), 23 Q. B. D. 453; 58 L. J. Q. B. 591.

(*y*) *Wing v. Harvey* (1851), 5 De G. M. & G. 265; 23 L. J. Ch. 511. See also the recent case of *Canning v. Farquhar* (1886), 16

Q. B. D. 727; 58 L. J. Q. B. 225, where a man had died after the acceptance of his proposal, but before tender of the premium, and it was held that the assurers need not grant a policy.

(*z*) (1883), 23 Ch. D. 552; 52 L. J. Ch. 762; *Faleke v. Scottish Imperial* (1886), 34 Ch. D. 234; 35 W. R. 143.

request of trustees has advanced money for the preservation of the property; and

- (4.) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property.

In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.

Fire Insurance.

DARRELL *v.* TIBBITTS. (1880)

[64.]

[5 Q. B. D. 560; 50 L. J. Q. B. 33.]

A steam roller belonging to the Brighton Corporation was so heavy that it broke the gas pipes in a street, and caused an explosion in one of the houses. The tenants of the house obtained compensation from the Corporation for the damage so done and repaired the premises, as they were bound to do by the terms of their lease. But it happened that the landlord had insured the house with the plaintiffs by a policy against fire covering injury by gas explosion, and the plaintiffs, unaware that by the terms of the lease the lessees were bound to make good injuries done by an explosion of gas, paid the policy money. But when they heard that the tenants had put the house all right again, they claimed a return of their money; and they were held to be entitled to it, because *a policy of fire insurance is a contract of indemnity*. As was remarked by Brett, L.J., if the plaintiffs could not recover the money back, "the whole doctrine of indemnity would be done away with; the landlord *would be not merely indemnified, he would be paid twice over.*"

The person who effects an insurance against fire must have an *interest* in the property insured, and he cannot recover beyond his *interest*. Necessity for "interest."

Communi-
cation of
material
facts.

Alteration
of pre-
mises.
Fires in
London.

Castellain
v. Preston.

interest. It is his duty, when effecting the insurance, to communicate to the insurers all material facts (*a*); and it is an implied condition that his description of the property is accurate (*a*). But when payment is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made. Thus, where a firm made a proposal in writing for a policy of fire insurance, and to the question "Has the proponent ever been a claimant in a fire insurance company?" answered "No," it was held that claims made by a member of the firm before he became a partner in it were not covered by the question, and that the answer was consequently not untrue (*b*). It is also an implied condition when a house is insured, that it *shall not be altered* so as to increase the risk (*c*). When a building in the metropolitan district is burnt down, any person interested may require the insurance money to be laid out in repairing or rebuilding the structure (*d*).

In the recent case of *Castellain v. Preston* (*e*), a vendor had contracted with a purchaser for the sale, at a specified sum, of a house at Liverpool, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the company. The purchase was afterwards completed, and the purchase-money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor. In an action by the company against the vendor, it was held that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit. "Darrell v. Tibbitts," said Brett, L.J., "seems to me to be entirely in favour of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell v. Tibbitts* the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. . . . The con-

(*a*) *Bufe v. Turner* (1815), 6 Taunt. 338; and see *Lindenau v. Desborough* (1828), 8 B. & C. 586; 3 C. & P. 353.

(*b*) *Davies v. National Marine Insurance Co.*, [1891] A. C. 435; 60 L. J. P. C. 73.

(*c*) *Sillem v. Thornton* (1854), 3

E. & B. 868; 23 L. J. Q. B. 362.

(*d*) 14 Geo. III. c. 78, s. 83; and see the recent case of *Anderson v. Commercial Union Assurance Co.* (1885), 55 L. J. Q. B. 146; 34 W. R. 189.

(*e*) (1883), 11 Q. B. D. 380; 52 L. J. Q. B. 366.

tract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from the contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except perhaps in the case of the serving and labouring classes under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of *Darrell v. Tibbitts* has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover." "On the principle of *Darrell v. Tibbitts*," said Cotton, L.J., "when the benefits afterwards accrued by the completion of the purchase the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is that, if the purchase-money has been paid in full, the insurance company will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them." "The answer to the question raised before us," said Bowen, L. J., "appears to me to follow as a deduction from the two propositions, first, that a fire insurance is a contract of indemnity, and secondly, that when there is a contract of indemnity no more can be recovered by the assured than the amount of his loss."

Another recent case of much interest is *Midland Insurance Co. v. Smith (f)*, where an insurance company granted a fire policy to a man named Smith, and during the currency of the policy, Mrs. Smith feloniously burnt the property insured. It would appear from this case that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy.

It is a common covenant in a lease that the lessee will keep the premises insured. Such a covenant runs with the land. If it is broken, relief against the forfeiture will generally be granted the first time of breaking, where no loss by fire has happened, and there is an insurance on foot at the time of the application for relief (g).

Midland Insurance Company v. Smith.

Forfeiture for not insuring.

(f) (1881), 6 Q. B. D. 561; 50 L. J. Q. B. 329. and 6, and see 44 & 45 Vict. c. 41, s. 11; *Quilter v. Mapleson* (1882),

(g) See 22 & 23 Vict. c. 35, ss. 4 9 Q. B. D. 672; 52 L. J. Q. B. 44.

Damage
done by
Fire
Brigade.

By the Metropolitan Fire Brigade Act, 1865 (*h*), s. 12, any damage occasioned by the Metropolitan Fire Brigade "in the due execution of their duties shall be deemed to be damage by fire within the meaning of any policy of insurance against fire."

Concealment from Marine Insurers.

[65.]

CARTER *v.* BOEHM. (1763)

[1 W. BL. 594; 3 BURR. 1905.]

The governor of Fort Marlborough, in the island of Sumatra in the East Indies, came to the conclusion that there was considerable danger of his fort being captured. He therefore wrote to his brother in England, and asked him to get the fort insured for a year. The brother accordingly went to Boehm & Co., who insured Fort Marlborough against capture by "a foreign enemy" between October 16th, 1759, and October 16th, 1760. In April, 1760, the fort was captured by the French, and this action was brought to recover the insurance money. The insurers declined to pay, on the ground that certain material facts contained in two letters which the governor had written to his brother in September, 1759, had been concealed from them. In those letters the governor spoke of the weakness of his fort, and the probability of the French attacking it. It appeared, however, that the fort was little more than a factory, being *merely intended for defence against the natives, so that its weakness was an immaterial fact as regarded the French*, while the probability of their attacking it was a question which a person in England was in a better position to determine than the

governor himself. Boehm & Co., therefore, were ordered to pay.

On the principle that the minds of the contracting parties are not *ad idem*, the concealment, whether wilful or accidental, of a material fact vitiates a policy of marine insurance. Everything that can increase the risk insured must be communicated (*i*), and it makes no matter that the fact was once actually known to the underwriter if it was not present to his mind at the time of effecting the insurance. A man once insured a merchant ship with an insurance office without telling them that she was identical with a once well-known and formidable Confederate cruiser. It was astonishing that they did not remember it. But the shipowner's omission to tell them was held to be fatal to his success on the policy (*k*). The rule on the subject has been stated in a later case to be that, while it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter, "*all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act*" (*l*). So the non-disclosure of the charterers' power to cancel the charter, whereby the shipowners might lose the freight, has been held to be an answer to an action on a policy (*m*). But, on the other hand, the party effecting the policy is not bound to disclose mere rumours, even if they have appeared in the newspapers, nor such things as it is the business of the underwriters to find out for themselves, such as the usage of trade, the dangers of particular seas and rivers, or the probabilities of hostilities (*n*). Nor need the insured communicate matter which forms an ingredient in a warranty, *e.g.*, that of seaworthiness (*o*).

What must be told.

The converted cruiser.

What need not be told.

By mercantile usage the slip, though not admissible in evidence as a contract (*p*), is treated as the contract for insurance. Therefore facts which have come to the knowledge of the assured *after the slip is signed, but before the policy is completed*, need not be com-

The slip.

(*i*) *Stribley v. Imp. Mar. Ins. Co.* (1876), 1 Q. B. D. 507; 45 L. J. Q. B. 396.

(*k*) *Bates v. Hewitt* (1867), L. R. 2 Q. B. 595; 36 L. J. Q. B. 282.

(*l*) *Ionides v. Pender* (1874), L. R. 9 Q. B. 531; 43 L. J. Q. B. 227; and see *Rivaz v. Gerussi* (1880), 6 Q. B. D. 222; 50 L. J. Q. B. 176; *Tate v. Hyslop* (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592.

(*m*) *Mercantile Steamship Co. v. Tyser* (1881), 7 Q. B. D. 73; 29 W. R. 790.

(*n*) *Gandy v. Adelaide Co.* (1871), L. R. 6 Q. B. 746; 40 L. J. Q. B. 239; but see *Harrower v. Hutchinson* (1870), L. R. 5 Q. B. 584; 39 L. J. Q. B. 229.

(*o*) *Haywood v. Rodgers* (1801), 4 East, 590; 1 Smith, 289; *Knight v. Cotesworth* (1883), 1 C. & E. 48.

(*p*) 30 & 31 Viet. c. 23, s. 7.

Opinion of
expert.

municated(*q*). Whether any particular fact was “material” or not, is a question for the jury. The point is not free from doubt, but *probably* on such an inquiry *skilled witnesses, having no interest in the matter litigated, can be called* to say that, if they had been the underwriters, they would or would not have been materially influenced by this or that fact(*r*).

Know-
ledge of
agent.

A firm of brokers, having instructions to insure an overdue vessel, received a confidential communication to the effect that the vessel was lost, whereupon they discontinued their negotiations and put their principal and the underwriters in direct communication, but did not inform them that the vessel was lost. The principals then effected an insurance with the same underwriters for £800, and also through other brokers, with other underwriters, one for £700. It was held that the latter policy was valid and binding on the insurers, but that the former could not be enforced. *Blackburn v. Vigors* (1887), 12 App. Cas. 531; 57 L. J. Q. B. 114; *Blackburn v. Haslam* (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479.

Abandonment to Underwriters.

[66.]

ROUX v. SALVADOR. (1836)

[3 BING. N. C. 266.]

In consequence of a leak in the ship that was carrying them, a cargo of hides began to putrefy, and it became obvious that, *as hides*, they would never reach the journey's end. Under these circumstances they were sold at an intermediate port, and fetched less than a fourth of their value. Happily for the owner, they were insured; and it was held that he *could claim for a total loss without an abandonment* (*s*).

(*q*) *Cory v. Patton* (1874), L. R. 9 Q. B. 577; 43 L. J. Q. B. 181; and see *Morrison v. Univ. Mar. Ins. Co.* (1873), L. R. 8 Ex. 197; 42 L. J. Ex. 115.

(*r*) *Berthon v. Loughman* (1817), 2 Stark. 258; *Rickards v. Murdock*

(1830), 10 B. & C. 527; but see *Campbell v. Rickards* (1833), 5 B. & Ad. 840; 2 N. & M. 542.

(*s*) And see *Asfar v. Blundell*, [1895] 2 Q. B. 196; 64 L. J. Q. B. 573.

A total loss may be *actual* or *constructive*. It is *actual* when no part of the subject-matter of the insurance exists in such a state as to serve any useful purpose. There is, of course, an actual total loss when the insured ship is consumed by fire, or destroyed by perils of the sea. But there is also an actual total loss if it is reduced to a mere wreck or congeries of planks (*t*), or if an insured cargo is so damaged as to exist only in the shape of a nuisance (*u*). A *constructive* total loss arises whenever the nature of the loss is such as to give reasonable ground to the assured for relinquishing the voyage altogether. The attitude he takes up towards the underwriters is of this kind,—“It is true my goods still exist; but look at their condition. It is really not worth my while to have them forwarded to their destination. My enterprise is practically a failure. I will have the policy money, and you can have these damaged goods to make what you can out of them.” This is called *abandonment*, and is required by law as a condition of the assured’s claiming for a constructive total loss. It is only fair, because otherwise he would be reaping an undue benefit from what is merely a contract of indemnity. Notice of abandonment must be given within a reasonable time after the assured has received intelligence of the loss (*x*). An abandonment may be made orally (*y*); but it must be certain (*z*), unconditional (*a*), and of the whole thing insured (*b*). On the other hand, if the underwriter means to dispute the matter, he must say so within a reasonable time after receiving notice of abandonment (*c*). In the recent case of *Forwood v. The North Wales, &c. Co.* (*d*), it was held that a constructive total loss was covered by a policy and bye-laws confining the insurance to “absolute damage caused by the perils insured against.”

Actual
total loss.

Constructive
total
loss.

Abandonment.

In the case of a policy of re-insurance, if a constructive total loss has happened, no notice of abandonment is necessary (*e*).

(*t*) *Cambridge v. Anderton* (1824), 2 B. & C. 691; 1 C. & P. 213; *Levy & Co. v. The Merchant Mar. Ins. Co.* (1885), 1 C. & E. 474; 52 L. T. 263.

(*u*) *Dyson v. Rowcroft* (1803), 3 B. & P. 474.

(*x*) *Mitchell v. Edie* (1787), 1 T. R. 608.

(*y*) *Read v. Bonham* (1821), 2 B. & B. 147; 6 Moore, 397.

(*z*) *Parmeter v. Todhunter* (1808), 1 Camp. 541.

(*a*) *McMasters v. Shoolbred* (1794), 1 Esp. 237.

(*b*) *Park*, 229.

(*c*) *Hudson v. Harrison* (1821), 3 B. & B. 97; 6 Moore, 288.

(*d*) (1880), 9 Q. B. D. 732; 49 L. J. Q. B. 593.

(*e*) *Uzielli v. Boston Mar. Insurance Co.* (1884), 15 Q. B. D. 11; 54 L. J. Q. B. 142.

Return of Premium.

[67.]

TYRIE *v.* FLETCHER. (1777)

[COWP. 668.]

This was an action against an underwriter for a return of part of the premium paid for the insurance of a ship called the "Isabella." The ship was insured "*at and from London to any port or place where or whatsoever for twelve months from the 19th of August 1776 to the 19th of August 1777, both days inclusive, at £9 per cent. warranted free from captures and seizures by the Americans and the consequences thereof.*" The "Isabella" was captured by an American privateer about two months after she had sailed from London. It was held that the risk was entire and had commenced; therefore there could be no return of premium.

When a plaintiff fails to establish his right to recover on a policy of marine insurance, the question arises whether he is entitled to a *return of premium*.

Two rules are clear:—

Risk
never com-
menced.

(1.) *Where the risk has not been run, the premium will be returned.* Thus, if the insured ship never sailed, or if the insured goods were never put on board, there must be a return (*f*). So when only part of the goods embraced by the policy is put on board, a proportionate part of the premium must be returned (*g*). So, too, the premium may be recovered where the policy is rendered void *ab initio* through non-compliance with a warranty (*h*).

Risk
once com-
menced.
Stevenson
v. Snow.

(2.) *Where the risk has once commenced, there can be no return of premium.* The well-known case of *Stevenson v. Snow* (*i*) is not really an exception to this rule. There the insurance was from London to Halifax, warranted to depart with convoy from Portsmouth. But when the ship got to Portsmouth, the convoy had

(*f*) *Martin v. Sitwell* (1692), 1 Show. 151.

(*g*) *Eyre v. Glover* (1812), 16 East, 218; 3 Camp. 276; and see *Horneyer v. Lushington* (1812), 15 East, 46;

3 Camp. 85.

(*h*) *Penson v. Lee* (1800), 2 Bos. & P. 330.

(*i*) (1761), 3 Burr. 1237; 1 W. Bl. 315.

gone. It was held that there must be a part return of the premium for the risk never incurred, viz., that of the voyage from Portsmouth to Halifax. “*There are two parts,*” said Lord Mansfield, “*in this contract; and the premium may be divided into two distinct parts, relative, as it were, to two voyages.*”

If the assured has been guilty of *fraud* (e.g., if he knew the ship was lost when he insured her) he cannot claim a return of the premium, even though the risk never commenced (*k*). Fraud and illegality.

So, where a policy is illegal, and the voyage has been performed, there can be no return, because *in pari delicto potior est conditio possidentis* (*l*). But while the illegal contract remains executory, there is a *locus penitentie*, and the assured may recover his premium on formally renouncing and retiring from the whole transaction (*m*).

Though not a case of marine insurance, the case of *Ferns v. Carr* (*n*) may be briefly referred to here. A Mr. Ferns was, in November, 1880, bound as an articled clerk for five years to a solicitor named Carr, and a premium of £150 was paid. In December, 1883, Carr died, leaving no partner to continue Ferns’ legal education during the remaining two years of the articles. In an action by Ferns’ pater against Carr’s executors, it was held that the estate was not liable for the return of any part of the premium. Farns v. Carr.

Deviation.



SCARAMANGA *v.* STAMP. (1880)

[68.]

[5 C. P. D. 295; 49 L. J. C. P. 674.]

The defendants’ steamship “Olympias” was chartered by the plaintiff to carry a cargo of wheat from Cronstadt to Gibraltar. When nine days out, she sighted another

(*k*) *Wilson v. Duckett* (1762), 3 Burr. 1361; *Cope v. Rowlands* (1836), 2 M. & W. 149; 2 Gale, 231; and *Allkins v. Jupe* (1877), 2 C. P. D. 375; 46 L. J. C. P. 824.

(*l*) *Lowry v. Bourdieu* (1780), 2 Doug. 468; *Paterson v. Powell* (1832), 9 Bing. 320; L. R. 2 C. P.

13, 68; *Herman v. Jeuchner* (1885), 15 Q. B. D. 561; 54 L. J. Q. B. 340.

(*m*) See *Palyart v. Leckie* (1817), 6 M. & S. 290.

(*n*) (1885), 28 Ch. D. 409; 54 L. J. Ch. 478. And see *ante*, page 122.

steamship, the "Arion," in distress, her machinery having completely broken down. The weather was fine and the sea smooth, so that the crew might easily have been taken off and saved; but the master of the "Arion," anxious to save his ship and cargo as well as the lives of his crew, agreed to pay the "Olympias" £1,000 to tow the ship into the Texel. Accordingly the "Olympias" took the "Arion" in tow, and, in so deviating from the ordinary course of her voyage, got ashore on the Terschelling Sands, and with her cargo was ultimately lost.

It was held that, as it was not reasonably necessary to take the "Arion" to the Texel in order to save the lives of those on board her, this deviation was unjustifiable, and therefore the plaintiff was entitled to recover the value of his cargo from the defendants as owners of the "Olympias."

Deviation to save life is justifiable.

Those in peril on the sea derive a substantial benefit from this case, which may be said to have distinctly decided that *a deviation for the purpose of saving life is justifiable*, though a deviation merely for the sake of saving *property* is not.

Necessity justifies deviation.

By deviation is meant a ship's intentional departing from the regular course of her journey, and (in the absence of agreement) it can only be justified by *overwhelming necessity*, e. g., to get provisions, to avoid capture, to repair damage, or, according to the leading case, to save life (*o*). The reason of the rule is that the assured has *no right to substitute a different risk* (*p*).

Consequences of improper deviation.

When a ship deviates unnecessarily, its owners are responsible for all loss, no matter how arising, that occurs during the deviation (*q*). But a deviation does not discharge the insurers from liability for previous loss (*r*).

Mere *intention to deviate* will not vitiate a policy (*s*).

(*o*) See *Urquhart v. Barnard* (1809), 1 Taunt. 450; *Phelps v. Hill*, [1891] 1 Q. B. 605; 60 L. J. Q. B. 382.

(*p*) See *African Merchants' Co. v. British Marine Insurance Co.* (1873), L. R. 8 Ex. 154; 42 L. J. Ex. 60.

(*q*) *Davis v. Garrett* (1830), 6 Bing. 716; 4 M. & R. 540. See also

Leduc v. Ward (1888), 20 Q. B. D. 475; 57 L. J. Q. B. 379; and *Glynn v. Margetson*, [1893] A. C. 351; 62 L. J. Q. B. 466.

(*r*) *Green v. Young* (1702), 2 Ld. Raym. 840.

(*s*) *Kewley v. Ryan* (1794), 2 H. Bl. 343; *Hare v. Travis* (1822), 7 B. & C. 14; 9 D. & R. 748.

Another implied warranty, the breach of which will prevent the insured from recovering on a voyage-policy, is that of *seaworthiness*. What is warranted is *not* that the ship *will continue*, but that it is, at the time of the effecting of the policy, seaworthy (*t*). The presumption is that a ship is seaworthy, but, if she goes wrong very shortly after sailing, the assured will be called on to show that it was from causes subsequent to the commencement of the voyage (*u*). A ship is not seaworthy if there is not a competent crew (*x*). Seaworthiness, however, is a term of relative import; and, "where the nature of the adventure, and the size and class of vessel to be employed, are known to both parties, the implied warranty of the shipowner cannot be carried further than that he shall *do his utmost* to make the particular vessel as fit for the voyage as she can possibly be made" (*y*). There is no warranty of seaworthiness implied in a *time-policy* (*z*).

Seaworthiness.

Degrees of seaworthiness.

In the recent salvage case of "The Glenfruin" (*a*), Butt, J., said, "I have always understood the result of the cases from *Lyon v. Mells* (1804), 5 East, 427, to *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377; 45 L. J. Q. B. 436, to be that under his implied warranty of seaworthiness the shipowner contracts not merely that he will do his best to make the ship reasonably fit, but that she shall be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the peers in the case of *Steel v. State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L. T. 333."

Salvage is the compensation which owners must make to those who by skill, enterprise and risk (*b*), have rescued their property from impending perils of the sea, or from the power of an enemy (*c*). The Court of Admiralty has jurisdiction over all claims to salvage. But cases below a certain amount and of inferior importance may be tried by county court judges or justices of the peace (*d*).

Salvage.

There is no hard-and-fast rule as to the proportion of the saved property which will be awarded to the salvors, which depends upon

(*t*) *Dixon v. Sadler* (1839), 5 M. & W. 405; 8 M. & W. 895.

(*u*) *Watson v. Clark* (1813), 1 Dow, 336.

(*x*) *Clifford v. Hunter* (1827), M. & M. 103; 3 C. & P. 16.

(*y*) Add. Contr. (8th ed.), 682; and see *Burges v. Wickham* (1863), 33 L. J. Q. B. 17; 3 B. & S. 669; *Clapham v. Langton* (1864), 34 L. J. Q. B. 46; 10 L. T. 875.

(*z*) *Gibson v. Small* (1853), 4 H. L. Ca. 353; 17 Jur. 1131; *Dudgeon v. Pembroke* (1877), 2

App. Cas. 284; 46 L. J. Q. B. 409.

(*a*) (1885), 10 P. D. 103, at p. 108; 54 L. J. P. 49.

(*b*) See *Aitchison v. Lohre* (1879), 4 App. Ca. 755; 49 L. J. Q. B. 123.

(*c*) The principal statutes on the subject are (as to civil salvage) 17 & 18 Vict. c. 104, and (as to military salvage) 27 & 28 Vict. c. 25 (The Naval Prize Act, 1864).

(*d*) See, as to jurisdiction of justices, the case of *The Mac* (1882), 51 L. J. P. D. & A. 81.

Amount payable.

the nature of the services rendered (*e*). If the salvors have entered into an agreement with the owners as to the amount to be paid, they must be content to claim under that agreement, which will generally be enforced, although a hard bargain for the rescued (*f*).

Pilots and passengers.

Passengers and crew are not generally entitled to salvage. Nor are pilots. Exceptional circumstances and services, however, may make a difference. "In order to entitle a pilot to salvage reward," said Brett, L. J., in the case of *Akerblom v. Price* (*g*), "he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward."

Misconduct of salvors.

Wilful or criminal misconduct of salvors may work an entire forfeiture of salvage; and mere misconduct not criminal (*e.g.*, violent and overbearing conduct) will operate to induce the Court to diminish the amount payable (*h*).

It is to be observed that, to found an action for salvage, it is essential that something more than human life should be saved. If no property is saved there can be no action, for there is no personal liability to pay salvage, and the claim can only attach to the property saved (*i*).

In a most meritorious case of salvage, where a steamship which had got aground on the shore of the Red Sea, ninety-five miles from Suez, in such a position that without help she must before many hours had elapsed have been lost with all hands on board her, was towed off the shore and to within a few miles of Suez by another steamship, the Court, on a value of 62,000*l.*, awarded the salvors 6,000*l.* (*k*).

In the *Sunniside* (*l*), it was held that in an action of salvage evidence of the loss of earnings by, and of the cost of repairing damage done to, the salving vessel in consequence of rendering salvage services is admissible. But these sums are to be regarded as elements for consideration in estimating the amount of the

(*e*) *The Erato* (1888), 13 P. D. 163; 57 L. J. P. 107.

(*f*) See, however, the recent case of *The Mark Lane* (1890), 15 P. D. 135; 63 L. T. 468, where the Court treated the agreement as inoperative, as having been made under compulsion. And see *The Rialto*, [1891] P. 175; 60 L. J. P. 71.

(*g*) (1881), 7 Q. B. D. 129; 50

L. J. Q. B. 629.

(*h*) *The Marie* (1882), 7 P. D. 203; 5 Asp. M. C. 27.

(*i*) *The Renpor* (1883), 8 P. D. 115; 52 L. J. P. 49; *The Annie* (1887), 12 P. D. 50; 56 L. J. P. 70.

(*k*) *The Lancaster* (1883), 9 P. D. 14; 49 L. T. 705.

(*l*) (1883), 8 P. D. 137; 52 L. J. P. 76.

salvage award, and are not to be considered as fixed amounts to be awarded to the salvors.

See also the cases of *The Livietta* (1883), 8 P. D. 24; 5 Asp. M. C. 132; *The Yan Yean* (1882), 8 P. D. 147; 52 L. J. P. 67; and *The Cheerful* (where the rescuing vessel had done a great deal of work, but not much good) (1886), 11 P. D. 3; 55 L. J. P. 5.

Salvage may be granted to the commander and crew of a Queen's ship, on the ground that they have rendered services in excess of their public duty, and thereby deserved remuneration (*m*).

Where, in pursuance of an agreement, a vessel towed a disabled ship towards port, but was compelled to leave her in a more dangerous position than before, whence she was afterwards rescued by another vessel, it was held that the former vessel was entitled to remuneration in respect of the work done, although not to salvage (*n*).

Average.

WHITECROSS WIRE CO. *v.* SAVILL. (1882) [69.]

[8 Q. B. D. 653; 51 L. J. Q. B. 426.]

The defendants were the owners of a ship called the "Himalaya," which in October, 1876, sailed from London for New Zealand with (amongst other things) some fencing wire of the plaintiffs' on board. Whilst lying at her port of destination, and before she had discharged all her cargo, a fire broke out in the hold, and ship and cargo were in imminent danger of destruction. Rising to the occasion, the master had a quantity of water poured into the hold upon the wire, and so the fire was put out and the ship saved.

This was an action to recover a contribution by way of general average for the damage thus deliberately in-

(*m*) *Cargo ex Ulysses* (1888), 13 P. D. 205; 58 L. J. P. 11.

(*n*) *The Benlarig* (1889), 14 P. D. 3; 58 L. J. P. 24.

flicted on the wire, and it was held that the claim was well founded.

Principle of general average.

It is sometimes essential to the safety of a ship and the success of the adventure to throw things overboard;—in technical language, to *jettison* them. The sacrifice being for everybody's benefit, it would obviously be unjust that the whole loss should fall on the owner whose goods were selected. The loss, therefore, is rateably adjusted between all the owners; and this adjustment is called *general average* (*o*).

Only merchandise liable.

Only *merchandise*, however, is liable to contribution; therefore not passengers' wearing apparel, nor provisions, nor convicts (*p*).

Salvation of ship necessary.

Moreover, it is essential to the liability to pay a general average contribution that the ship should have been saved, and that the sacrifice should have materially conduced thereto; or, as Lord Tenterden has well put it, that the jettison should be "*the effect of danger and the cause of safety*." The part of the cargo thrown overboard must also have been properly laden, *e.g.* (unless warranted by usage), not on deck (*q*).

Masts and sails.

Masts and sails destroyed in consequence of having to carry an unusual press of sail (*e.g.*, as in *Covington v. Roberts* (*r*), to escape from a French privateer) are not subjects of general average; but if they have been deliberately cut away for the sake of saving the ship, they are (*s*).

Incidental expenses.

Incidental expenses may also be claimed. For instance, when a ship goes into port in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average (*t*).

The law on this subject was exhaustively considered in the recent case of *Svendsen v. Wallace* (*u*) before the House of Lords. A ship

(*o*) For an exhaustive history of the law of general average, see the judgment of Watkin Williams, J., in *Pirie v. Middle Dock Co.* (1881), 43 L. T. 426.

(*p*) *Brown v. Stapyleton* (1827), 4 Bing. 119; 12 Moore, 334. See also *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro* (1887), 19 Q. B. D. 362; 57 L. J. Q. B. 31.

(*q*) *Gould v. Oliver* (1837), 4 Bing. N. C. 131; 5 Scott, 445; and see *Wright v. Marwood* (1881), 7 Q. B. D. 62; 50 L. J. Q. B. 643.

(*r*) (1806), 2 B. & P. N. R. 378.

(*s*) *Birkley v. Presgrave* (1801), 1 East, 220.

(*t*) *Atwood v. Sellar* (1880), 5 Q. B. D. 286; 49 L. J. Q. B. 515; *Plummer v. Wildman* (1815), 3 M. & S. 482; *Power v. Whitmore* (1815), 4 M. & S. 141. See, too, *Anderson v. Ocean Steamship Co.* (1884), 10 App. Ca. 107; 54 L. J. Q. B. 192.

(*u*) (1885), 10 App. Ca. 404; 54 L. J. Q. B. 497; and see *Rose v. Bank of Australasia*, [1894] A. C. 687; 63 L. J. Q. B. 504.

on a voyage (from Rangoon to Liverpool) having sprung a dangerous leak, the captain, acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of ship, cargo, and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded, and the voyage completed. In an action by the shipowners against the cargo owners, it was held that the latter were not chargeable with a general average contribution in respect of the expenses of re-shipping the cargo.

It is to be observed that a person who has been compelled to pay a general average contribution will generally have his remedy over against the underwriters, so that they are often really the interested parties in questions of general average. Remedy over.

Particular average is "a very incorrect expression used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever" (*x*). Such a loss rests where it falls. The ordinary form of policy on goods contains the following "memorandum" intended to protect the underwriter from liability for partial losses which might be claimed in respect of certain perishable commodities:— Particular average.

"*N.B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5l. per cent., and all other goods, also the ship and freight, are warranted free from average under 3l. per cent., unless general, or the ship be stranded*" (*y*). Thememo-
randum.

The underwriter, then, agrees to be liable if the ship is "stranded." There has been much litigation on the question, What is a "stranding"? The leading case on the point is *Wells v. Hopwood* (*z*), where Lord Tenterden said that a vessel's taking the ground "under any *extraordinary circumstances* of time or place, by means of some unusual or accidental occurrence," will constitute a stranding. But it will not be a stranding if she takes the ground *in the ordinary course of navigation* (*a*). Thus, in the case of *Letchford v. Oldham* (*b*), where it appeared that the paddles of steamers leaving a harbour at low tide had caused an elevation and a hole, into which the vessel had pitched, it was held that there was no strand-

(*x*) Abbott on Shipping (12th ed.), p. 497.

(*y*) See *Price v. Al Ships Assoc.* (1889), 22 Q. B. D. 580; 58 L. J. Q. B. 269; *The Alsace Lorraine*, [1893] P. 209; 62 L. J. P. 107.

(*z*) (1832), 3 B. & Ad. 20.

(*a*) *Kingsford v. Marshall* (1832), 8 Bing. 458; 1 M. & Scott, 657; *Hearne v. Edmunds* (1819), 1 B. & B. 388.

(*b*) (1880), 5 Q. B. D. 538; 49 L. J. Q. B. 458.

ing. The striking on a rock is not a stranding unless the vessel thereby becomes stationary (c).

If there is a stranding the policy applies, though the loss was not really caused by it (d).

Suing on Quantum Meruit.

[70.]

CUTTER v. POWELL. (1795)

[6 T. R. 320.]

The defendant had a ship which was about to sail from Jamaica to England, and wanted a second mate. In answer to an advertisement a suitable person presented himself in the shape of Mr. T. Cutter, and the defendant gave him a note to this effect:—

“Ten days after the ship, ‘Governor Parry,’ myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of 30 guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool.”

The ship set sail on July 31st, and arrived at Liverpool on October 11th, but on the voyage Cutter died. He had gone on board on July 31st, and had performed his duty faithfully and well up to the time of his death, which occurred on September 20th,—that is to say, when more than two-thirds of the voyage was accomplished.

“In this case,” said one of the judges, “the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage, and the latter was to be

(c) *MacDongle v. R. Exch. Ass. Co.* (1815), 4 Camp. 283; 4 M. & S. 503.

(d) Per Lord Tenterden in *Wells v. Hopwood*, *supra*.

entitled either to 30 guineas or nothing; for such was the agreement between the parties."

An entire contract cannot be apportioned. An ironmonger once agreed to make some dilapidated chandeliers "complete" for 10*l*. He set to work on them, and certainly very much improved them. But he did *not* make them "complete," and therefore he did not succeed in recovering a farthing, although it was quite clear that the work he had done was worth 5*l*. at least (*e*). Entire contract.

But the case is different *when the contract is not entire, but divisible.* A shipwright agreed to put an old vessel into "thorough repair," nothing being said about the amount or mode of payment. The shipwright began the job, but, getting distrustful of his employers, he declined to go on with it unless he was paid for what had already been done. He was successful in his demand, the Court distinguishing the case from *Sinclair v. Bowles* (*f*), on the ground that there the contract was to do a specific work for a specific sum, whereas here there was *nothing amounting to a contract to do the whole repairs and make no demand till they were completed* (*g*). The workman, moreover, will not lose his pay because, while the goods are still in his custody, they are accidentally destroyed, so that the employer gets no benefit from the work (*h*). Divisible contract.

Generally speaking, when the contract is entire, there are only two cases in which the plaintiff can demand payment on a *quantum meruit* without having wholly performed his part of the contract.

(1.) *Where the defendant has absolutely refused to perform, or has incapacitated himself from performing, his part of the contract.* Employer breaking contract.

In such a case it is *not the plaintiff's fault* that he has not performed his part of the contract, and it would be obviously unjust that he should suffer by the faithlessness of the party he contracted with. A literary gentleman once undertook to write a treatise on Ancient Armour for the "Juvenile Library." But the "Juvenile Library" proved so little successful that its promoters resolved to abandon it, whereby the literary gentlemen, who had taken several journeys to examine specimens of armour, and had written several chapters of his proposed work, was damnified to the extent of 50*l*. It was held that, as the special contract was at an end and broken by the defendants, the plaintiff might sue on a *quantum meruit* (*i*). Books for boys.

(*e*) *Sinclair v. Bowles* (1829), 9 B. & C. 92; 4 M. & R. 1; and see *Needler v. Guest* (1648), Aleyn, 9; *Bates v. Hudson* (1825), 6 D. & R. 3.

(*f*) *Supra*.

(*g*) *Roberts v. Havelock* (1832), 3 B. & Ad. 401.

(*h*) *Menetone v. Athawes* (1764), 3 Burr. 1592. But see *Appleby v. Myers* (1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331, and *O'Neil v. Armstrong*, [1895] 2 Q. B. 418; 64 L. J. Q. B. 552.

(*i*) *Planché v. Colburn* (1831), 8 Bing. 11; 5 C. & P. 58.

Employer
adopting
benefit.

(2.) Where work has been done under a special contract, though not in strict accordance with its terms, and the defendant has derived a benefit from it under such circumstances as to raise an implied promise to pay for it.

Refusal to
accept.

In this case, however, the employer may refuse to accept the work done; it is only when he does accept and take the benefit of it that he may be sued on a *quantum meruit*, and if the work done is of such a nature (e. g., buildings on the employer's own land) that it cannot be rejected, there is no implied promise to pay for it (k).

“Extras.”

In building contracts there is often a *deviation* from the original plan by consent of the parties. The rule as to the workmen's payment for the extras so entailed is that *the original contract is to be followed so far as it can be traced*; but if it has been *totally abandoned*, then the workman may charge for his work according to its value, as if the original contract had never been made (l). If, however, the extras have been done by the plaintiff without any authority from the defendant, the latter is not bound to pay for them (m); and where by the terms of the contract extras are to be ordered in writing, the defendant is liable only for such as are so ordered (n). Even where the employer has assented to the deviation, he will not be liable for extras unless he must necessarily have known that the effect would be to increase the expense (o).

Licences.

[71.]

WOOD v. LEADBITTER. (1845)

[13 M. & W. 838; 14 L. J. Ex. 161.]

Mr. Wood usually made a point of seeing the Leger. But, while he was in the Grand Stand enclosure at the Doncaster races in 1843, with a four days' ticket, for

(k) *Ellis v. Hamlen* (1810), 3 Taunt. 52; *Burn v. Miller* (1813), 4 Taunt. 745; and *Munro v. Butt* (1858), 8 E. & B. 738; 4 Jur. N. S. 1231.

(l) *Pepper v. Burland* (1792), Peake, 139; *Robson v. Godfrey* (1816), Holt, N. P. C. 236.

(m) *Dobson v. Hudson* (1857), 1 C. B. N. S. 652.

(n) *Russell v. Dabandeira* (1862), 13 C. B. N. S. 149; 32 L. J. C. P. 68; and see *Tharsis Sulphur Co. v. McElroy* (1878), 3 App. Cas. 1040.

(o) *Lovelock v. King* (1831), 1 Moo. & Rob. 60.

which he had paid a guinea, in his pocket, an official came up to him, and "in consequence of some alleged malpractices of his on a former occasion connected with the turf," requested him to leave, adding that, if he did not, it would be his duty to turn him out. Mr. Wood declined to go, and so Leadbitter, by order of Lord Eglintoun, the steward of the races, took him by the shoulders and dragged him out.

For this assault, as he called it, Mr. Wood now brought an action, maintaining that he was on the Grand Stand by the licence of Lord Eglintoun, inasmuch as that nobleman had sold him a ticket, and that such licence was irrevocable. It was held, however, that such a licence was *not* irrevocable, and that Lord Eglintoun had a perfect right, without assigning any reason, to order the plaintiff to quit the enclosure, and, if necessary, to have him forcibly removed.

The leading case goes no further than to establish that a *mere licence* (even though under seal) is revocable; the reason being that such a licence confers no interest in land, but *only renders lawful what would without it be a trespass*. Such a licence may be revoked, not merely by express words, but by any act of the licensor which shows his unwillingness or inability to continue it. *Locking a gate*, for instance, or *selling a field*, would operate as a revocation. Of course, if the agreement was regular, an action for damages lies on the licence being revoked.

But if the licence is more than a mere licence, if it comprises or is connected with a grant, then the person who has given it cannot revoke it so as to derogate from his own grant. Thus, if a person sells goods on his own land, and gives the vendee a licence to come and take them, he cannot revoke the licence; and the vendee would be justified in breaking down the gates and entering to take the goods (*p*). But a licence connected with an invalid grant is revocable (*q*). In the case of *Winter v. Brockwell* (*r*), it was held that a parol licence given to a neighbour to erect a sky-light *on the neighbour's own land* could not be revoked after it had been executed

(*p*) *Wood v. Manley* (1839), 11 A. & E. 34; 3 P. & D. 5.

(*q*) *Roffey v. Henderson* (1851), 17 Q. B. 574; 21 L. J. Q. B. 49.

(*r*) (1807), 8 East, 308.

Licence confers no interest in land.

Licence how revoked.

Licence, when irrevocable.

at the neighbour's expense. But a parol licence to make a drain *on the licensor's land* may be withdrawn at pleasure, though the licensee may have spent quite a fortune over it (*s*).

Tenant or
licensee?

Difficulties sometimes arise in practice as to whether an instrument creates a tenant or merely a licensee. The test appears to be whether it was the intention of the parties that the person let into possession should have the *exclusive* possession or not. If it is clear that that was *not* the intention of the parties, the instrument is not a demise or lease, although it contains the usual words of demise (*t*). As to when a licence is *exclusive*, reference should be made to the recent case of *Sutherland v. Heathcote* (*u*), when the distinction between a mere licence and a *profit à prendre* was discussed. This distinction is also pointed out in *Wickham v. Hawker* (*x*), which is a leading case on rights of sporting.

May
licensee
sue third
party?

Though a licensee has no title as against his licensor, it is not so clear that he may not sue a third person who interrupts him in the enjoyment of his licence. In *Nuttall v. Bracewell* (*y*), a mill-owner, who had for some time enjoyed the benefit of the flow of water through a goit from a natural stream, was held entitled to recover damages against a riparian owner for intercepting the water of the stream, and Bramwell, B., put his right to succeed on the plain ground that a riparian landowner can grant to a non-riparian landowner the flow of water from the stream to his premises for the use of the premises, and the grantee may sue for a disturbance of his enjoyment by a higher riparian owner. Some of the judges, however, were inclined to consider that the plaintiff was a riparian proprietor in respect of the goit, and on that ground decided in his favour. Speaking of the previous case of *Hill v. Tupper* (*z*) (where the Basingstoke Canal Company had given the plaintiff the exclusive right of putting pleasure boats on the canal, and yet it was held that their having done so gave him no right of action against a publican who also began putting boats on the canal), Bramwell, B., said, "But it may be said how is *Hill v. Tupper* distinguishable? One mode of enjoying land covered with water is to row boats on it, and the owner has an exclusive right. I think it easy to point out the distinction. It was competent for the grantors in that case to grant to the plaintiff a right of rowing boats on the canal; and had anyone interfered with that right, the grantee

(*s*) *Hewlins v. Shippam* (1826), 5 B. & C. 221; 7 D. & R. 783.

(*t*) *Hancock v. Austin* (1863), 14 C. B. N. S. 634; 32 L. J. C. P. 252; and see *Stanley v. Riky* (1893), 31 L. R. Ir. 196.

(*u*) [1892] 1 Ch. 475; 61 L. J. Ch. 248.

(*x*) (1840), 7 M. & W. 78.

(*y*) (1866), L. R. 2 Ex. 1; 36 L. J. Ex. 1.

(*z*) (1863), 2 H. & C. 121; 8 L. T. 792.

might have maintained an action against him. But the plaintiff there did not sue for any such cause of action. He sued, not because his rowing was interfered with, but because the defendant used a boat on the water."

Bailments.

COGGS *v.* BERNARD. (1704)

[72.]

[2 LD. RAYM. 909; SALK. 26.]

Coggs required several hogsheads of brandy to be moved from one London cellar to another. Instead of employing a regular porter to do the job, he accepted the gratuitous services of his friend Bernard, who undertook to effect the removal safely and securely. But the amateur did his work so clumsily that one of the casks was staved, and much of the liquor was lost. Coggs was not pleased; and, as he successfully maintained an action against Bernard for damages, probably that gentleman never again volunteered rash acts of friendship.

WILSON *v.* BRETT. (1843)

[73.]

[11 M. & W. 113; 12 L. J. Ex. 264.]

A person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale is bound, in so doing, to use such skill as he actually possesses. "The defendant," said Parke, B., "was shown to be a person conversant with horses, and was therefore bound to use such skill as a person conversant with horses might

reasonably be expected to use: if he did not, he was guilty of negligence.”

Definition. Cogg's *v.* Bernard is the great case on bailments. A bailment is a delivery of a thing in trust for some special case, the person who delivers it being called the *bailor*, and the person to whom it is delivered the *bailee*.

Lord Holt's division. Lord Holt divides bailments into six kinds:—*depositum*, *mandatum*, *commodatum*, *vadium*, *locatio rei* and *locatio operis faciendi*. But it is better to begin with this classification of bailments:—

1. For the *benefit* of the *bailor*, alone;
2. For the *benefit* of the *bailee*, alone;
3. For the *mutual benefit* of bailor and bailee.

Our division.

1. Under the first head come *depositum* and *mandatum*.

Depositum. *Depositum*—the delivery of goods *to be taken care of* for the bailor without the bailee receiving anything for his trouble; *e.g.*, going away from home to the sea-side, I ask my friend Brown to take care of my plate. In the recent case of *Ultzen v. Nicols (a)*, the plaintiff went into the defendant's restaurant for the purpose of dining; and his overcoat was received by the waiter at a table and, without any directions, hung up on a peg in the room. When the plaintiff rose to leave his overcoat was gone. It was held that the jury were, on these facts, justified in finding that there was a bailment and such negligence as rendered the defendant liable. The depositary (unless he has spontaneously offered to take care of the goods) is responsible only for *gross* negligence. But, having been grossly negligent, he cannot defend himself by showing that he *has lost his own things with the bailor's (b)*.

The missing overcoat.

Vigilance of bailor. The bailor must exercise a certain amount of *vigilance in the selection of his bailee*. If I were to entrust my watch to an idiot, or a little girl, to take care of, no amount of negligence on their part would give me a right of action against them. I must bear the consequences of my folly, and be more sensible next time. So, in *Howard v. Harris (c)*, where a manuscript play was sent unsolicited to a theatrical manager, and lost by him, it was held that the recipient bailee was only liable for wilful negligence, and not for mere carelessness.

As a rule, the depositary *may not make use of* the thing deposited. But, if no harm would come thereby, he may: and, if I “deposit” my horse with a man, he not only may but *ought* to give it proper exercise.

(a) [1894] 1 Q. B. 92; 63 L. J. Q. B. 289. and see *Giblin v. McMullen* (1868), L. R. 2 P. C. 317; 38 L. J. P. C. 25.

(b) *Doorman v. Jenkins* (1834), 2 Ad. & E. 258; 4 N. & M. 170; (c) (1884), 1 C. & E. 253.

The depositary must give up the thing deposited to the owner, even though a stranger, on demand (*d*).

When money is deposited with a person for safe custody, *and not by way of loan*, no right of action arises until demand is made for it by the depositor, and therefore the Statute of Limitations does not begin to run until such demand (*e*). Statute of Limitations.

Mandatum—the delivery of goods *to be done something with* for the bailor without the bailee receiving anything for his trouble; *e. g.*, I ask my friend Jones to post a letter for me. *Mandatum.*

As in *depositum* (and *mandatum* is only a kind of superior depositum) the bailee is liable for gross negligence only. The contract between Coggs and Bernard was one of *mandatum*, though it is to be observed that Bernard laid additional responsibility on his shoulders by undertaking to effect the removal “safely.” In the well-known case of *Dartnall v. Howard* (*f*) the action was brought for negligently laying out money on bad securities. The defendants had (so far as appeared from the pleadings) acted in the matter gratuitously, and on this ground it was held that the plaintiffs were not entitled to recover damages from them.

The rule, however, that a mandatary is responsible for gross negligence only, is to some extent qualified by the maxim *spondes peritiam artis*. It is stated in the case that gross negligence was not imputed to Brett. Literally, this is true. But what is ordinary negligence in one man is gross negligence in another; and the omission by a person endowed with skill to make use of that skill is really nothing short of gross negligence. In this view, *Wilson v. Brett* is no exception to the rule that a gratuitous bailee is responsible only for gross negligence; constructively, Brett *was* guilty of gross negligence. So, too, a doctor who attended a poor person out of charity would be liable for merely ordinary negligence in the treatment of his patient; constructively, it would not be merely ordinary negligence, because his position implies skill (*g*). Skilled mandataries.

An action cannot be brought on a *promise to enter on* a gratuitous bailment, there being no consideration for it. But if the promisor *actually sets about* the business, he then becomes responsible for gross negligence, the trust reposed in him by the bailor being a sufficient consideration (*h*). Consideration in *mandatum*.

(*d*) *Buxton v. Baughan* (1834), 6 C. & P. 674; and *Biddle v. Bond* (1865), 6 B. & S. 225; 34 L. J. Q. B. 137; and see *Henderson v. Williams*, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308.

(*e*) *In re Tidd*, *Tidd v. Overell*, [1893] 3 Ch. 154; 62 L. J. Ch. 915.

(*f*) (1825), 4 B. & C. 345; 6 D. & R. 438; and see *Wilkinson v. Coverdale* (1793), 1 Esp. 75; and *Robinson v. Ward* (1825), R. & M. 274; 2 C. & P. 59.

(*g*) *Shiells v. Blackburne* (1789), 1 H. Bl. 158.

(*h*) *Elsev v. Gatward* (1793), 5 T. R. 143.

2. Under this head (for the benefit of the bailee alone) comes *Commodatum*—the *lending* of a thing to be returned just as it is; *e.g.*, I lend Jones my umbrella to go through the rain with; I do not expect him to return me *another* umbrella, but *the same one*. If I expected a borrower to return me, not the identical things, but similar, *e.g.*, If I were to lend him half-a-dozen postage stamps, or a five pound note, it would not be *commodatum*, but *mutuum*.

As the bailee is the only person who gets any good out of *commodatum* (except perhaps a lawyer now and then), he is responsible even for *slight* negligence; the more so as by the fact of borrowing he may be taken to have represented himself to the lender as a fit and proper person to be entrusted with the article.

Duties of borrower. The commodatary must strictly pursue the terms of the loan. If I borrow a horse or a book to ride or to read myself, I have no business to allow somebody else to ride or to read it (*i*). If the horse is lent for the highway, I must not take it along dangerous bridle paths. The bailee must restore the chattel, when the time has expired, just as it was, reasonable wear and tear excepted. He is not responsible, however, if the article perishes by inevitable accident, or by its being stolen from him without any fault of his. In *mutuum*, on the other hand, the right of property and risk of loss are immediately on the bailment transferred to the borrower, so that if he is robbed before he gets home, he must still pay the equivalent to the lender. As a general rule, a bailee cannot set up *jus tertii* against his bailor (*k*).

Duties of lender. The bailor must disclose defects of which he is aware; as, for instance, that the gun which he lends his friend Brown is more likely than not to burst and blow his hand off (*l*). The ground of this obligation is that, *when a person lends, he ought to confer a benefit, and not to do a mischief* (*m*). The lender, however, will not be responsible for defects of which he is ignorant (*n*).

The commodatary has no lien on the thing lent for antecedent debts due to him; nor, of course, can he keep it till the bailor pays the necessary expenses he has been put to in the keeping of it.

3. Under the last head (for the mutual benefit of bailor and bailee) come *radium*, *locatio rei*, and *locatio operis*.

(*i*) See, however, a distinction taken by North, C. J., in *Bringloe v. Morrice* (1676), 1 Mod. 210, between lending a horse to a person for a *specified time* and lending it for a *particular journey*.

(*k*) *Ex parte Davies* (1881), 19 Ch. D. 86; 45 L. T. 632. See also *Rogers v. Lambert*, [1891] 1 Q. B.

318; 60 L. J. Q. B. 187.

(*l*) *Blakemore v. Brist. & Ex. Ry. Co.* (1858), 8 E. & B. 1035; 4 Jur. N. S. 657.

(*m*) *Adjuvari quippe nos, non decipi, beneficio oportet*. Dig. lib. xiii. tit. vi. 17.

(*n*) *MacCarthy v. Young* (1861), 6 H. & N. 329; 3 L. T. 785.

(1.) *Vadium* (otherwise known as *pignoris acceptum*), the contract *Vadium*, of pawn.

The benefit being mutual, the degree of diligence required of the bailee is "ordinary." If, in spite of due diligence, the chattel is lost while in the pawnee's keeping, he may still sue the pawnor for the amount of his debt.

The effect of the contract of pawn is not (like that of a mortgage of personalty) to pass the property in the chattel to the bailee; nor, on the other hand, is it (like that of a lien) merely to give him a hostage, but it gives him such a special property in the thing pawned as enables him, if the pawnee makes default, to sell it and pay himself (*o*); the surplus being, of course, handed back to the pawnor. And a pledgee may redeliver the goods to the pledgor for a limited purpose, without thereby losing his rights under the contract of pledge (*p*).

Pawning at common law.

As a rule, the pawnee may not make use of the thing bailed to him. If, however, it is an article which cannot be the worse for the use—jewellery, for instance—he may; but in such a case he would be responsible for the loss, no matter how it happened. Moreover, if the pawn be of such a nature that the pawnee is put to expense to keep it, *e.g.*, if it be a horse or a cow, the pawnee may make use of it,—riding the horse or milking the cow—as a recompense for the cost of maintenance.

Such are some of the common law rules as to *vadium*; and they apply now to cases where the sum lent exceeds 10*l*. But when the sum lent by way of *vadium* is less than 10*l*., the Pawnbrokers Act, 1872 (*q*), applies. That Act provides that every pledge must be redeemed within twelve months and seven days. If it is not redeemed within that time, what becomes of it depends on whether the sum lent was more or less than 10*s*. If it was 10*s*. or less, the article then becomes the pawnbroker's absolute property. If it was more, the pawnbroker may sell the thing pledged, but must hand over the surplus, after satisfaction of his debt and interest, to the pawnor. If the sale of the pledge realizes less than the amount of the debt, a pawnbroker still possesses his common law right to recover the balance (*r*). Till actual sale, however, a pledge pawned for above 10*s*. is redeemable, though the year and seven days have gone by (*s*). The pawnbroker is liable for loss by fire, and should pro-

The Pawn-brokers Act.

(*o*) *Tucker v. Wilson* (1714), 1 P. Wins. 260; but see *Clark v. Gilbert* (1835), 2 Bing. N. C. 356; 2 Scott, 520; *Ex parte Hubbard* (1886), 17 Q. B. D. 690; 55 L. J. Q. B. 490.

(*p*) See *North Western Bank v. Poynter*, [1895] A. C. 56; 64 L. J. P. C. 27.

(*q*) 35 & 36 Vict. c. 93.

(*r*) *Jones v. Marshall* (1890), 24 Q. B. D. 269; 59 L. J. Q. B. 123.

(*s*) Sect. 18.

tect himself by insuring (*t*). He is liable, too, for any injury done to the thing pawned by his "default and neglect, or wilful misbehaviour," and a court of summary jurisdiction may order compensation for such depreciation (*u*). Sect. 25 says that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge," but it has been held in a recent case that the owner of an article that has been stolen and pawned may (notwithstanding the section) recover it, or its value, from the pawnbroker (*v*). So, too, where a person entrusted with goods for the purpose of sale only, pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent" within the meaning of sect. 2 of the Factors Act, 1889, and the pawnbroker is not protected by that section from an action by the owner to recover the value of the goods (*x*).

Locatio rei. (2). *Locatio rei*—the every-day contract of the hiring of goods.

This being a mutual benefit bailment, the degree of negligence for which the hirer is answerable is "ordinary." The hirer of a horse once physicked it himself, instead of calling in a veterinary surgeon. He prescribed "a stimulating dose of opium and ginger," and of course the animal "soon after taking it died in great agony." On the ground that he had not exercised "that degree of care which might be expected from a prudent man towards his own horse," the hirer was held liable (*y*).

The responsibility of the hirer to take reasonable care of the goods hired extends to all injuries caused to them by the negligence of his servant to whom he may have intrusted the care of them. Thus, in the recent case of the Coupé Company *v.* Maddick (*z*), the defendant hired a carriage and horse from the plaintiffs; his coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction; and while so engaged, the carriage and horse were injured, owing to his negligent driving. It was held, that there had been a breach of the defendant's contract as bailee, for which he was liable.

If the hirer does something plainly inconsistent with the terms

(*t*) Sect. 27.

(*u*) Sect. 28.

(*v*) *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37; 49 L. J. Ex. 224.

(*x*) *Hastings v. Pearson*, [1893] 1 Q. B. 62; 62 L. J. Q. B. 75.

(*y*) *Deane v. Keate* (1811), 3 Camp. 4.

(*z*) [1891] 2 Q. B. 413; 60 L. J. Q. B. 676. And as to the liability of a gratuitous bailee for his servant's wrongful acts, see *Giblin v. McMullen* (1868), L. R. 2 P. C. 317; 38 L. J. P. C. 25; and *Neuwith v. Over-Darwen Industrial Society*, (1894) 10 R. 588; 63 L. J. Q. B. 290.

of the bailment, *e. g.*, if he sells the article hired, the bailment is at an end (*a*).

It may be mentioned here that what is called the *hire system*, under which goods are delivered to a person to be paid for by instalments, does not vest the property in the goods in the purchaser till all the instalments are paid (*b*). Whether a *hire and purchase* agreement does or does not fall within the provisions of sect. 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45), depends upon its terms. On this point the recent decision of the House of Lords, in *Helby v. Matthews* (*c*), should be referred to, and the terms of the agreement in that case should be compared with those in the case of *Lee v. Butler* (*d*). The chief distinction between these cases is, that in the latter the so-called "hirer" was bound by the terms of the agreement to pay for and purchase the furniture, while in the former he was under no such liability.

Hire and purchase agreements.

(3.) *Locatio operis faciendi*. When the bailee is to bestow labour on or about the thing bailed, and to be paid for such labour.

Locatio operis faciendi.

Bailees of this class are, for instance, wharfingers, agisters, carriers, &c.

Generally speaking, the rule as to diligence is the same as in *radium* and *locatio rei* (*e*). But the bailee must have his wits about him, and take proper precautions against casualties that may possibly happen (*f*). And when the bailee is a person exercising a public employment, *e. g.*, a common carrier or an innkeeper, he is required to exert much greater circumspection. In fact, a common carrier is an insurer, being responsible for loss by any cause except the act of God or the king's enemies. Moreover, if a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor (*e. g.*, if, having contracted to warehouse goods at one place, he warehouses them at another, where

(*a*) *Fenn v. Bittlestone* (1851), 7 Ex. 159; 21 L. J. Ex. 41; and see *Nyberg v. Handelaar*, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709.

(*b*) *Ex parte Crawcour* (1878), 9 Ch. Div. 420; 47 L. J. Bk. 94. And see *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 638; 60 L. J. Q. B. 493; *Madell v. Thomas*, [1891] 1 Q. B. 230; 60 L. J. Q. B. 227.

(*c*) [1895] A. C. 471; 64 L. J. Ch. 465; reversing the decision of the Court of Appeal, [1891] 2 Q. B. 577; 63 L. J. Q. B. 577. The decision in *Payne v. Wil-*

son, [1895] 1 Q. B. 653; 64 L. J. Q. B. 328; was, by consent, reversed in the Court of Appeal; see [1895] 2 Q. B. 537. And see *Shenstone v. Hilton*, [1894] 2 Q. B. 452; 63 L. J. Q. B. 581.

(*d*) [1893] 2 Q. B. 318; 62 L. J. Q. B. 591.

(*e*) See *Searle v. Laverick* (1871), L. R. 9 Q. B. 122; 43 L. J. Q. B. 43.

(*f*) *Leck v. Maestaer* (1807), 1 Camp. 138; and see *Thomas v. Day* (1803), 4 Esp. 262; *The Moorcock* (1889), 11 P. D. 61; 58 L. J. P. 73; and *The Calliope*, [1891] A. C. 11; 60 L. J. P. 28.

they are accidentally destroyed) he takes upon himself the risks of so doing (*g*).

Agister. An agister (*e.g.*, a person who takes in horses or cattle to feed in his pasture) is not an insurer, but must use reasonable care (*h*). For instance, if he leaves the gates of his field open, or his fences are out of order, he will be liable for loss happening thereby (*i*). So, if he has not taken proper precautions to prevent mischief, he will be liable for an injury inflicted by another animal (*k*). In the absence of agreement, an agister has no lien (*l*).

In *Clarke v. Earnshaw* (*m*) the plaintiff had delivered a timepiece to the defendant, a watchmaker, to be repaired. The watchmaker had locked it up in a drawer in his shop, from which it was stolen by a youth who used to sleep in the shop for the express purpose of protecting the property. The defendant was held liable because it appeared that he had put other watches in a more secure place.

Trover. As to the right to maintain trover in these bailments, it may be remarked that in *vadium* and *locatio rei* it is only the bailee who can do so; for in either of those contracts he can exclude the bailor from the possession. But in the other kinds of bailment either bailor or bailee may sue, but the recovery of damages by either would generally deprive the other of his right of action.

The recent case of *Claridge v. South Staffordshire Tramway Co.* (*n*) is instructive on this subject. There, the owner of a horse delivered it to the plaintiff, an auctioneer, for sale, with liberty to use it until sold. Whilst the horse was being driven by the plaintiff's servant in the plaintiff's carriage, it was frightened by a steam tramcar of the defendants', and fell, with the result that both horse and carriage were injured. The accident was wholly due to the defendants' negligence. It was held that the plaintiff could only recover damages for the injury to his carriage, and not for the injury to the horse, because, in the absence of negligence, he was under no liability to his bailor for any depreciation in the horse.

Vituperative
epithets.

The terms "gross negligence," "ordinary negligence," &c., have been freely used in speaking of these bailments. Many eminent lawyers, however, maintain that there are really no degrees of negligence, and that, as Rolfe, B., said in *Wilson v. Brett*, negli-

(*g*) *Lilley v. Doubleday* (1881), 7 Q. B. D. 510; 51 L. J. Q. B. 310.

(*h*) *Broadwater v. Bolt* (1817), Holt, 547; *Seton v. Lafone* (1887), 19 Q. B. D. 68; 56 L. J. Q. B. 164.

(*i*) *Groucott v. Williams* (1863), 32 L. J. Q. B. 237; 8 L. T. 458.

(*k*) *Smith v. Cook* (1875), 1

Q. B. D. 79; 45 L. J. Q. B. 122.

(*l*) *Jackson v. Cummins* (1839), 5 M. & W. 342; and *Richards v. Symons* (1845), 8 Q. B. 90; 15 L. J. Q. B. 35.

(*m*) (1818), Gow, 30.

(*n*) [1892] 1 Q. B. 422; 61 L. J. Q. B. 503.

gence and *gross* negligence are “the same thing, with the addition of a vituperative epithet.”

Liability of Innkeepers.

CALYE'S CASE. (1584)

[74.]

[8 COKE, 33; RES. 5.]

A traveller arriving at an inn dismounted from his horse, and told the landlord to send it out to pasture. The landlord, accordingly, did so; but, when its master wished to resume his journey, it was nowhere to be found. The owner now tried to make out that the landlord was responsible. But it was held that he was *not*, for the horse had been sent into the field at the express desire of the guest.

The liability of innkeepers, like that of common carriers, probably had its origin in their readiness to collude with highwaymen, often their best customers. That liability was at common law very great. They were not indeed responsible for losses arising by the act of God or the king's enemies, but they were responsible for all other losses, unless they could make out clearly that it was the guest's own fault. In 1863, however, the liability of innkeepers was greatly restricted, and by the Act then passed (*o*), an innkeeper is never bound to pay more than 30*l.* for loss of or injury to property brought to his inn, except in the following cases:—

1. Where the article which has been lost or injured is “a horse, or other live animal, or any gear appertaining thereto, or any carriage.” Common law liability.

2. Where the property has been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper, or of one of his servants. Act of 1863.

3. Where the property has been expressly deposited with him for safe custody. The innkeeper, however, may require, as a condition Horse or carriage.

(*o*) 26 & 27 Vict. c. 41.

of his liability, that the guest shall fasten and seal up his property in a box or other receptacle.

Posting up
sect. 1.

But the innkeeper is not to be entitled to the benefit of this Act unless he puts up a copy of section 1, printed in plain type, in a conspicuous part of his entrance-hall, and he had better take care not to omit material parts of the section, or play other pranks with the Act, for the Courts have shown clearly that they will not allow innkeepers to trifle with it. The landlord of the "Old Ship" at Brighton posted up what purported to be a copy of section 1. But through some mistake the word "act" was left out, so that the sentence ran "wilful default or neglect" instead of "wilful act, default, or neglect." A gentleman staying at the hotel in November, 1875, had his watch and things stolen during the night, and went to law with the landlord to recover their value. The defendant paid 30*l.* into Court, but said that the Act protected him against any further claim. But it was held that, as he had not posted up a correct copy of section 1, he was not entitled to the benefit of the Act (*p*). "We have an omission," said Cockburn, C. J., "which is far beyond a mere clerical error. It is an omission of a substantial part of the notice. When we have an omission of a material and really substantial part of the notice required by statute, I cannot think it a copy sufficient to satisfy the requirements of the Act."

It may be mentioned that it has been held at *nisi prius* (in a case from Ryde, where the real question appears to have been whether the chambermaid's allowing a stranger to go upstairs to wash his hands without accompanying him was an act of negligence) that *the word "wilful" in the first section applies only to the following word "act,"* and not to the next following words, "default or neglect" (*q*).

Supposing the innkeeper not to have complied with the conditions of this Act, his liability remains the same as at common law, almost his only defence being to show that his guest has been negligent. The question of the guest's negligence must in all cases depend upon the surrounding circumstances (*r*). If he has not used the ordinary care which may reasonably be expected from a prudent man, he cannot make the innkeeper responsible for the loss of his goods. In *Armistead v. Wilde* (*s*), for instance, there had been an ostentatious display of bank notes, with a good deal of bragging, and the guest had let everybody see that he put the notes in an ill-secured box. "These facts," said Lord Campbell, C. J., "might or might not amount to negligence, but they were evidence of it; and it was

(*p*) *Spice v. Bacon* (1877), 2 Ex. Div. 463; 46 L. J. Q. B. 713.

(*q*) *Squire v. Wheeler* (1867), 16 L. T. 93.

(*r*) Per Lopes, J., in *Herbert v. Markwell* (1882), 45 L. T. 649.

(*s*) (1851), 17 Q. B. 261; 20 L. J. Q. B. 524.

a fair question for the jury." The omission by the guest to leave valuable articles with the innkeeper, or to fasten his bedroom door at night, is not necessarily negligence (*t*). It may or may not be according to the circumstances. What would be prudent in a small hotel in a small town might be the extreme of imprudence at a large hotel in a city like Bristol, where probably 300 bedrooms are occupied by people of all sorts (*u*). See also the cases of *Cashill v. Wright* (watch and money stolen from bedroom) (1856), 6 E. & B. 891; 2 Jur. N. S. 1072; and *Burgess v. Clements* (1815) (jewellery stolen from private room left unlocked at an Oxford inn), 4 M. & S. 306; 1 Stark. 251.

If a guest refuses to pay the reckoning, the landlord has a lien on the luggage and belongings which he brought to the inn, whether they are the man's own or not (*x*). Thus, in the recent case of *Robins v. Gray* (*y*), a commercial traveller who travelled for the plaintiffs, went in the course of their business to stay as a guest at the defendant's inn. While he was there the plaintiffs sent to him certain parcels of goods for sale in the district, which goods the defendant at the time they were received into the inn knew to be the goods of the plaintiffs, and not of the traveller. Subsequently, the traveller failed to pay for his board and lodging in the inn. The Court held that the defendant had a lien upon the goods in respect of the debt. If the bill is not settled in six weeks, the landlord may sell the goods, handing back any surplus there may be (*z*). He is required to advertise the sale a month beforehand in a London and local newspaper. In the recent case of *Angus v. McLachlan* (*a*), it was held that an innkeeper who accepts security from his guest for the payment of his charges does not therein waive his lien. "As I understand the law," said Kay, J., "it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it. In this case the lien is within the provisions of 41 & 42 Vict. c. 38, by virtue of which the innkeeper not only has a passive lien, but also the active right to sell the goods upon giving the notice required by the Act. Is it probable that he would have given up

Inn-
keeper's
lien.

(*t*) *Morgan v. Ravey* (1861), 6 H. & N. 265; 30 L. J. Ex. 131.

(*u*) Per Montagu Smith, J., in *Oppenheim v. White Lion Co.* (1871), L. R. 6 C. P. 515; 40 L. J. C. P. 93.

(*x*) *Threfall v. Bowick* (1875), L. R. 10 Q. B. 219; 44 L. J. Q. B. 87; and see *Broadwood v. Granara* (1854), 10 Ex. 417; 24 L. J. Ex. 1;

Gordon v. Silber (1890), 25 Q. B. D. 491; 59 L. J. Q. B. 507.

(*y*) [1895] 2 Q. B. 78; 64 L. J. Q. B. 591. Affirmed by the Court of Appeal, [1895] 2 Q. B. 501.

(*z*) 41 & 42 Vict. c. 38.

(*a*) (1883), 23 Ch. Div. 330; 52 L. J. Ch. 587; and see *Cowell v. Simpson* (1809), 16 Ves. 275.

this active lien ? There is nothing in the case inconsistent with the continuance of the lien which the plaintiff undoubtedly had before the security was given." It was also held in this case that an innkeeper keeping his guest's goods under his lien need not use more care about their custody than he uses as to his own things of a similar kind. An innkeeper may not detain the person of his guests for non-payment of his bill.

Sending
horse to
pasture
without
authority.

It was said in *Calye's* case that, if the landlord had sent the horse into the field without his guest's authority, he would have been responsible. Such a case has actually occurred. A Bewdley innkeeper, whose coach-house was full, put a guest's gig into the adjoining street without saying a word to him on the subject. The gig was stolen, and the owner sued the innkeeper, who was held liable on the ground that he had chosen to treat the street as part of the inn (*b*).

An action for the loss of goods at an hotel must be brought against the person really carrying on the business, not against a paid manager, although the justices' licence may have been granted in his name (*c*).

Definition
of inn.

An inn has been defined as "a house where the traveller is furnished with everything he has occasion for while on his way" (*d*). A coffee-house where there are beds may be such a place; but not a lodging or boarding-house: and it has lately been decided, in a case where a man had insisted on entering accompanied by an offensive dog, that a refreshment bar attached to an hotel, under the same roof, but with a separate entrance, is not (*e*). Any traveller (not being a thief or prostitute, or constable on duty, or having a contagious disease, or being some other essentially objectionable person) who is ready to pay for his accommodation, and conducts himself properly, can claim admission into an inn, if there is room, at any hour of the day or night; and if the landlord refuses it, an action lies against him, or he may be indicted (*f*). The mere purchase of temporary refreshment, or the putting up of his horse, makes a man a guest, so as to raise the innkeeper's responsibility (*g*). But it has been held that a temporary waiter at a ball given at an inn is not a guest, and cannot recover from the landlord

(*b*) *Jones v. Tyler* (1834), 1 Ad. & E. 522; 3 N. & M. 576.

(*c*) *Dixon v. Birch* (1873), L. R. 8 Ex. 135; 42 L. J. Ex. 135.

(*d*) *Thompson v. Lacy* (1820), 3 B. & Ald. 283, where it was contended that the defendant's establishment was not an inn, because it was not frequented by stage coaches and waggons from the

country, and had no stables.

(*e*) *R. v. Rymer* (1877), 2 Q. B. D. 136; 46 L. J. M. C. 108.

(*f*) *Fell v. Knight* (1841), 8 M. & W. 269; 5 Jur. 554; *R. v. Ivens* (1835), 7 C. & P. 213.

(*g*) *Bennett v. Mellor* (1793), 5 T. R. 274; *York v. Grindstone* (1705), 1 Salk. 388.

the value of an overcoat heartlessly stolen whilst he is discharging his important duties (*h*).

As to the effect of a notice in a bedroom of an inn that “articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same,” reference should be made to the recent case of *Huntly v. Bedford Hotel Co.* (*i*), where it was held that this notice did not constitute a special bargain with a guest that the landlord would be responsible if jewels were kept under lock. Notices in bedrooms.

In the recent case of *Strauss v. The County Hotel Co.* (*k*), the plaintiff had arrived at Carlisle and given his luggage to the hotel porter with a view to staying at the hotel, when an important telegram induced him to alter his intentions. He told the porter to lock up the luggage, which was done; but afterwards some of the property was found to be missing. It was held that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest, and therefore that the defendants were not responsible. The liability of an innkeeper continues during the temporary absence of his guest (*l*); but if a host invites one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller (*m*). Strauss's case.

As to who is a “guest,” and as to the *onus of proof* in actions against innkeepers for the loss of their guests' property, reference should be made to the recent important case of *Medawar v. Grand Hotel Co.*, [1891] 2 Q. B. 11; 60 L. J. Q. B. 209. Medawar's case.

“*Proper Vice.*”

BLOWER *v.* GREAT WESTERN RAILWAY CO. [75.]
(1872)

[L. R. 7 C. P. 655; 41 L. J. C. P. 268.]

Mr. Blower had a bullock which he wanted to send by railway from a small station near Monmouth to Northampton. The beast was duly loaded to Mr. Blower's satis-

(*h*) *Carter v. Hobbs*, 12 Mich. 52.

(*i*) (1892) 56 J. P. 53.

(*k*) (1883), 12 Q. B. D. 27; 53

L. J. Q. B. 25.

(*l*) *Day v. Bather* (1863), 2 H. & C. 14; 32 L. J. Ex. 171.

(*m*) Bac. Abr. Inns. c. 5.

faction in one of the Great Western Railway Company's trucks, but on the journey it managed to escape, and got killed on the line. Admitting that the company had not been at all negligent in the carrying of the animal, were they not liable as common carriers? No; for the disaster was due to the "*inherent vice*" of the subject of bailment.

Third exception.

The effect of this case is practically to introduce a third exception to the rule that common carriers are insurers. They are to be excused not only when the loss has been occasioned by the act of God or the king's enemies, but also if it has happened through the *inherent defect* of the thing carried.

Perishable articles.

The leading case was followed in *Nugent v. Smith* (*n*), where a horse, while being conveyed by sea from London to Aberdeen, received fatal injuries through getting frightened at a storm. So, too, a common carrier is not responsible for the deterioration of perishable articles, or for the evaporation or leakage of liquids.

Gill's case.

But in all such cases the carrier will be liable for his negligence. About ten years ago a man sent a cow by train from Doncaster to Sheffield. When it got to Sheffield a porter rather unadvisedly released it, and it ran into a tunnel and was killed. The restiveness and stupidity of the cow was undoubtedly the real cause of its death, but the porter ought not to have been in such a hurry to let it out; and on this latter ground his masters were held responsible (*o*).

Bad packing.

A carrier, again, will not be responsible for injury happening through the *improper packing* of the subject of bailment; at all events, if he was not aware that it was packed improperly. Thus it has been held that a railway company cannot be charged with negligence if a greyhound escapes through the insufficiency of a chain and collar supplied by the owner and appearing to be good enough (*p*).

Dangerous goods.

A person who delivers a dangerous substance to a common carrier without giving him any information about it is responsible for all the evil consequences arising therefrom (*q*). It has been expressly

(*n*) (1876), 1 C. P. D. 423; 45 L. J. C. P. 697.

(*o*) *Gill v. M. S. & L. Ry. Co.* (1873), L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; see also *Hudson v. Baxendale* (1857), 2 H. & N. 575; 27 L. J. Ex. 93.

(*p*) *Richardson v. N. E. Ry. Co.* (1872), L. R. 7 C. P. 75; 41 L. J.

C. P. 60.

(*q*) *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; 31 L. J. C. P. 137, which was the case of a carboy of nitric acid bursting while being carried from London to Croydon and injuring the plaintiff; and see *Brass v. Maitland* (1856), 6 E. & B. 470; 26 L. J. Q. B. 49.

provided by Act of Parliament (*r*) that a carrier is not bound to receive such things. But a carrier cannot refuse to carry a parcel merely on the ground that he is not informed of its contents (*s*).

It is to be observed that common carriers are not necessarily general carriers. To ascertain the nature and extent of a carrier's business reference must be made to his public professions and representations (*t*). Common carriers not general carriers.

A common carrier is bound at common law to receive and carry all goods reasonably offered to him, and for the carrying of which the person bringing the goods is ready to pay (*u*). In the absence of a special contract, he must deliver within a time that is reasonable, regard being had to all the circumstances (*x*). Provided he carry by a reasonable route, he is not bound to carry by the shortest, even though empowered by statute to charge a mileage rate for carriage (*y*).

Special Contracts with Carriers.

PEEK *v.* NORTH STAFFORDSHIRE RAILWAY CO. (1863) [76.]

[10 H. L. C. 443; 32 L. J. Q. B. 241.]

Mr. Peek, of Stoke-upon-Trent, wanted to send some marble chimney-pieces from there to London, and to get it done as cheaply as possible. With that view he opened negotiations with an agent of the North Staffordshire Railway Company. The agent said the company would not be responsible for damage to the chimney-pieces unless the value was declared, and they were insured at the rate of 10 per cent. on the declared value. This rate Peek

(*r*) 29 & 30 Vict. c. 69.

(*s*) *Crouch v. L. & N. W. Ry. Co.* (1854), 14 C. B. 255; 23 L. J. C. P. 73.

(*t*) *Johnson v. Midland Ry. Co.* (1849), 4 Exch. 367; 18 L. J. Ex. 366; and *Oxlade v. N. E. Ry. Co.* (1864), 15 C. B. N. S. 680; 26 L. J. C. P. 129.

(*u*) *Pickford v. Grand Junct. Ry. Co.* (1841), 8 M. & W. 372.

(*x*) *Taylor v. G. N. Ry. Co.* (1866), L. R. 1 C. P. 385; 35 L. J. C. P. 210.

(*y*) *Myers v. L. & S. W. Ry. Co.* (1869), L. R. 5 C. P. 1; 39 L. J. C. P. 57.

considered too high, and finally he sent a note to the agent requesting him to send the chimney-pieces "not insured."

The marble received injury on the journey through exposure to rain and wet, and Peck now sought to make the company responsible for the whole of the damage done.

The two chief questions were—

1. Whether the condition was "just and reasonable;"

2. Whether there was a "special contract signed;"

and both these questions were decided in the plaintiff's favour.

Public notices.

Before 1830 common carriers were accustomed to get rid of their common law liability as insurers of the goods committed to them by *posting up notices*. If it could be shown that the notice had come to the knowledge of the customer, he was presumed to have assented to its terms, and the carrier was only liable in the case of wilful misfeasance or gross negligence.

Land Carriers Act.

The efficacy of these public notices was destroyed in 1830 by the Land Carriers Act(*z*); but the Act reserved the carrier's right to make a special contract with his customer. The courts, however, were in many instances very hard on the customer, holding, for example, that a notice put on the receipt given to a person delivering goods to be carried amounted to a special contract, and in 1854 further legislation was deemed to be necessary. In that year was passed the Railway and Canal Traffic Act(*a*), which still permits the making of special contracts, but provides that no one shall be bound by any such contract with a railway or canal company (1) *unless he (or his agent) has signed it (b), and* (2) *it is "just and reasonable."*

Railway and Canal Traffic Act.

Notices by land and sea carriers.

31 & 32 Vict. c. 119, s. 14, however, gives public notices a certain amount of validity in the case of land and sea carriers. The condition sought to be enforced must be published in a conspicuous manner in the office where the through booking is effected, and must also be printed in a legible manner on the receipt or freight note given by the company.

"Just and reasonable."

Whether a condition is "just and reasonable" under sect. 7 of the Railway and Canal Traffic Act is a question for the judge at the

(*z*) 11 Geo. IV. & 1 Will. IV. c. 68.

(*a*) 17 & 18 Vict. c. 31.

(*b*) But the unsigned contract

would be binding *on the company*. *Baxendale v. G. E. Ry. Co.* (1869), L. R. 4 Q. B. 224; 38 L. J. Q. B. 137.

trial, subject, of course, to the review of the divisional and higher courts. A condition which states that the company *will not be responsible for damage to horses, "however caused,"* is unreasonable and bad (*c*). So is one which *disclaims responsibility for a parcel insufficiently packed* (*d*). So, too, in the recent case of *Ashendon v. L. B. & S. C. Ry. Co.* (*e*) (where an Italian greyhound got lost on its way from Brighton to Rochester), a condition that a railway company *would not be liable "in any case" for loss of, or damage to, a horse or dog above certain specified values, unless the value was declared,* was held bad. But "if an owner of goods to whom the full protection of the Railway and Canal Traffic Act is offered on reasonable terms, deliberately elects, for the valuable consideration of a substantial reduction in the cost of carriage, to agree to release the carriers from certain liabilities, he cannot escape from the contract so entered into, unless he can show that he has been so far overreached in the transaction as to make the agreement void at common law, or that the offer of the alternative is a fraud upon the statute" (*f*). In the recent case of *Brown v. M. S. & L. Ry. Co.* (*g*), a Grimsby fish merchant, in consideration of getting his fish taken to London at a cheaper rate, signed a contract by which the railway company were to be relieved "from all liability for loss or damage by delay in transit, or from whatever other cause arising." It was held in the House of Lords (reversing the decision of the Court of Appeal) that the contract was reasonable, and relieved the company from liability for loss through delay in transit caused by the negligence of their servants. "The question," said Lord Watson, "as to what constitutes a reasonable condition is not a question which judges can decide, as against their successors, by anticipation; it is a question of fact in each case, depending upon the discretion of the judge who is dealing with it, and, according to my view, not of law, and must be judged of according to the circumstances in each case. No doubt there are very many valuable suggestions in the case of *Peek v. The North Staffordshire Railway Company*. But we are not dealing with a case in its circumstances similar to that, according to my apprehension of the facts of it, because there it was held

Conditions held bad.

Alternative rates.

The Grimsby fish merchant's case.

(*c*) *McManus v. Lanc. & Yorks. Ry. Co.* (1859), 4 H. & N. 327; 27 L. J. Ex. 201.

(*d*) *Simons v. G. W. Ry. Co.* (1856), 18 C. B. 805; 26 L. J. C. P. 25.

(*e*) (1880), 5 Ex. Div. 190; 42 L. T. 586.

(*f*) Per Fitzgibbon, L. J., in *McNally v. Lanc. & Yorks. Ry. Co.* (1880), 8 L. R. Ir. 81; *McCarthy*

v. G. W. Ry. Co. (1839), 18 L. R. Ir. 1; and *Ruddy v. Midl. G. W. Ry. Co.* (1880), 8 L. R. Ir. 224.

(*g*) (1883), 8 App. Cas. 703; 48 L. T. 473; and see the recent case of *Dickson v. G. N. Ry. Co.* (1886), 18 Q. B. D. 176; 56 L. J. Q. B. 111, where a notice by a railway company exempting themselves from liability for valuable dogs was held just and reasonable.

that the company had really proposed to exact a rate so high, not for the honest and *bona fide* purpose of giving an alternative to the trader, but solely with the view of giving no alternative and compelling him to adopt one rate practically in preference to another. I cannot see in the present case the least trace of that compulsion. I cannot find anything in the character of this case to suggest to my mind that the condition is unreasonable." "Really," said Lord Bramwell, with characteristic straightforwardness, "it is difficult for me to express the opinion which I entertain upon this question with a sufficient apparent respect for the opinion of those who have thought differently—namely, the learned judges in the court below . . . I must say that I really do think this is *about the plainest case that ever came before your Lordships' House.*"

Condi-
tions held
good.

Amongst conditions that have been held to be "just and reasonable," may be mentioned one, that a company *shall not be liable for loss of market or other claim arising from delay or detention of any train(h)*; another, *placing the carriage of such perishable goods as fish or fruit under special regulations(i)*; and a third, *exempting the company from liability for loss or damage to live stock from suffocation, etc.(k).*

Gold-
smith's
case.

In the recent case of *Goldsmith v. The Great Eastern Railway Company(l)*, clover seed was carried by the defendants "solely at the risk of the sender, with the exception that the company shall be responsible for any wilful act or wilful default of the company." The goods were misdelivered, so that they did not arrive at their proper destination till after a fortnight's delay. It was held that there was nothing in the special contract to free the defendants from their liability as carriers.

Gordon's
case.

In another recent case(*m*), a man delivered some cattle to a railway company to be taken from Waterford to Gloucester, and prepaid the carriage. The clerk, however, stupidly forgot to put "carriage paid" on the consignment note, and the consequence was that delivery was refused at Gloucester till the mistake was rectified, and the cattle had been for some time exposed to the weather. According to the terms of the contract of carriage, the company, in consideration of an alternative reduced rate, were "not to be liable

(h) *White v. G. W. Ry. Co.* (1857), 2 C. B. N. S. 7; 26 L. J. C. P. 158.

(i) *Beal v. South Devon Ry. Co.* (1860), 5 H. & N. 875; 29 L. J. Ex. 441.

(k) *Pardington v. South Wales Ry. Co.* (1856), 1 H. & N. 392; 26 L. J. Ex. 105.

(l) (1881), 44 L. T. 181; 29 W. R. 651. See also the recent case of *Cutler v. North London Railway* (1887), 19 Q. B. D. 64; 56 L. J. Q. B. 648.

(m) *Gordon v. G. W. Ry. Co.* (1881), 8 Q. B. D. 44; 51 L. J. Q. B. 58.

in respect of any loss or detention of, or injury to, the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company or its servants." It was held that the withholding of the cattle under a groundless claim to retain them was not "detention" within the condition, and that the company were therefore liable. The court also were inclined to think that the company had been guilty of "wilful misconduct," but it was unnecessary to decide that point.

The still more recent case of *Stevens v. G. W. Ry. Co.* (*n*), was a case of misdelivery of goods consigned at owner's risk rate with protection against "wilful misconduct on the part of the company's servants." It was held that the mere misdelivery was not evidence of wilful misconduct, the plaintiff must go further and show how it occurred. Stevens' case.

The 7th section of the Railway and Canal Traffic Act has no application to goods left at a railway cloak room (*o*), nor to contracts by railway companies to carry over other lines (*p*); but it extends to their sea traffic (*q*).

Land Carriers Act.

MORRITT *v.* NORTH EASTERN RAILWAY CO. [77.] (1876)

[1 Q. B. D. 302; 45 L. J. Q. B. 289.]

Mr. Morrith was a passenger by the defendants' railway from York to Darlington, and had with him two water-colour drawings tied by a rope face to face. They were above the value of 10*l.*, but he made no declaration

(*n*) (1885), 52 L. T. 324, distinguishing *Hoare v. G. W. Ry. Co.* (1879), 37 L. T. 186; 25 W. R. 63. For list of conditions which have been held to be reasonable, see *Hodges on Railways*, 7th ed. p. 568.

(*o*) *Van Toll v. S. E. Ry. Co.* (1862), 31 L. J. C. P. 241; 12

C. B. N. S. 75.

(*p*) *Zunz v. S. E. Ry. Co.* (1869), L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.

(*q*) 31 & 32 Viet. c. 119; and see *Cohen v. S. E. Ry. Co.* (1876), 1 Ex. D. 217; 2 Ex. D. 253; 45 L. J. Ex. 298; 46 L. J. Ex. 417.

of their value. He handed them to the guard, asking him to take care of them, and saw them labelled "Darlington." When the train reached Darlington, Morritt got out, took a fresh ticket to Barnard Castle, and told the porter to see that the drawings were taken out and put into the Barnard Castle train. The drawings, however, were not taken out, but were carried on to Durham, and when Morritt saw them again they had been greatly injured, "holes having been made in them."

The question was, whether the Carriers Act applied to the case of goods *negligently carried beyond the point of destination* so as to protect the railway company, and it was held that it did.

"Bankers and others."

In the good old times it was the frequent practice of "bankers and others" to send "articles of great value in small compass," such as cases of jewellery, by the public conveyance without telling the carrier what he was carrying, and then afterwards, if the things were lost, to come down on the unfortunate man for compensation.

Act of 1830.

To protect him against this manifest unfairness, the Land Carriers Act of 1830 (*r*) was passed. Its object is twofold:—

(1.) The carrier is to be *informed* when he is carrying anything particularly valuable, so that he may give it a corresponding amount of protection.

(2.) In recognition of the extra responsibility and trouble, he is to have *extra pay*.

The Carriers Act, it is to be observed, *applies only to carriers by land*. But when there is one entire contract to carry *partly by land and partly by sea*, the contract is divisible, and *during the land journey* the carrier is within the protection of the Act (*s*).

"Articles of great value in

Put shortly, the 1st section of the Act provides that no land carrier is to be liable for the loss of, or injury to, any one of certain specified "articles of great value in small compass" (*t*) contained in any parcel or package *when the value of the article exceeds 10l.*,

(*r*) 11 Geo. IV. & 1 Will. IV. c. 68.

(*s*) *Le Conteur v. L. & S. W. Ry. Co.* (1865), L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.

(*t*) The words quoted from the preamble, however, are not of any real importance. A *large* looking-glass, for instance, is within the section. *Owen v. Burnett* (1834), 2 Cr. & M. 353; 4 Tyr. 133.

unless the person delivering it to the carrier *declares its value and agrees to pay more* for its carriage; and the construction placed on the section is that it protects the carrier in all cases of loss or injury by *accident or negligence*, but does not protect him against the consequences of his *wilful misfeasance* (a), nor against delay without loss (x).

small compass."

The leading case was followed in the recent case of *Millen v. Brasch* (y). The defendants in that case were carriers from London to Rome, and received the plaintiff's trunk containing silks and sealskins worth 40*l.*, no value being declared, for Italy. Somehow they made a mistake between the plaintiff's trunk and a case of Christmas cards consigned to somebody at New York, sending the silks and sealskins to America and the Christmas cards to Italy. In their defence, the carriers claimed the protection of the Carriers Act; but the plaintiff contended that they were not entitled to it, because they were wrongdoers in having sent the trunk on the wrong road, and not on the journey contracted for. To this objection, however, *Morritt v. The North Eastern Railway Co.* was held to be a conclusive answer. It was also held in *Millen v. Brasch* that the carrier was not deprived of the protection of the Act by the fact that the loss of the goods was temporary and not permanent; and that the plaintiff was not entitled—on this point the Court of Appeal reversing the decision of the court below—to recover as damages the cost of the repurchase of other articles at Rome at enhanced prices in place of those temporarily lost.

Christmas cards mistaken for sealskins.

The word "value" in the first section means the value to the *consignor*, so that, if he was selling the articles to Jones for 12*l.*, it is of no consequence that he had bought them the day before from Brown for 9*l.* (z). "He may have had them as a gift," remarked Lord Coleridge, C. J., "and is the value nothing to him because he has really paid nothing for them?"

Meaning of "value."

The part of the section which has been the most litigated is the part specifying the "articles of great value in small compass." *Painted carpet designs*, it has been held, are not "paintings" (a). *Hat bodies made partly of fur and partly of wool* are not "furs" (b). *German silver fuzee boxes* are not "trinkets" (c). But a *chronometer*

Decisions as to articles enumerated.

(a) *Hinton v. Dibbin* (1842), 2 Q. B. 646; 2 G. & D. 36.

(x) *Hearn v. L. & S. W. Ry. Co.* (1855), 10 Ex. 793; 24 L. J. Ex. 180.

(y) (1882), 10 Q. B. D. 142; 52 L. J. Q. B. 127.

(z) *Blankensce v. L. & N. W. Ry. Co.* (1881), 45 L. T. 761.

(a) *Woodward v. L. & N. W. Ry. Co.* (1878), 3 Ex. Div. 121; 47 L. J. Ex. 263.

(b) *Mayhew v. Nelson* (1833), 6 C. & P. 58.

(c) *Bernstein v. Baxendale* (1859), 6 C. B. N. S. 251; 28 L. J. Ch. 265.

is a "time-piece" (*d*). The word "writings," it has been held in a county court case (*e*), will include the manuscript of an author. In "pictures" *frames* are included (*f*). A *packed waggon* sent for carriage by a railway company, containing articles of the specified kind and put on a truck, is a "parcel or package" within the section (*g*).

The declaration of the value and nature of the goods must be made at the time of delivery, whether that be at the carriers' office, at the sender's house, on the road, or elsewhere (*h*).

Thefts by
carriers'
servants.

Sect. 8 of the Carriers Act provides that the carrier shall be responsible for the felonious acts of his servants, notwithstanding that the customer may not have declared and insured his goods. This section, however, "cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to the case of the valuables specified in the Act"; per Wright, J., in the recent case of *Shaw v. Great Western Railway Co.* (*i*), where it was held that the neglect or default of a railway company or its servants mentioned in sect. 7 of the Railway and Canal Traffic Act, 1854 (*k*), does not extend to acts of a servant beyond the scope of his employment, such as theft. And a railway company carrying goods can therefore, like other carriers, protect itself by special contract against theft of the goods even by its own servants, and the statutory requirement that the contract shall be reasonable does not apply. The section has been so construed that, while, on the one hand, the customer need not give evidence that would fix any particular servant with the theft (*l*), on the other, it is not sufficient for him merely to show that nobody had a better opportunity of stealing his things than the company's servants (*m*). The servant of a carrier employed by a railway company is a servant of the company for the purposes of the section (*n*), but the company may show that the thief falsely represented himself to be the carriers' servant (*o*).

Horses,

The 7th section of the Railway and Canal Traffic Act (*p*) provides

(*d*) *Le Conteur v. L. & S. W. Ry. Co.*, *supra*.

(*e*) *Lawson v. L. & S. W. Ry. Co.*, *Law Times*, June 24, 1882.

(*f*) *Henderson v. L. & N. W. Ry. Co.* (1870), L. R. 5 Ex. 90; 39 L. J. Ex. 55.

(*g*) *Whaite v. Lanc. & Yorks. Ry. Co.* (1874), L. R. 9 Ex. 67; 43 L. J. Ex. 47.

(*h*) *Baxendale v. Hart* (1851), 6 Ex. 769; 21 L. J. Ex. 123.

(*i*) [1894] 1 Q. B. at p. 383; 70 L. T. 218.

(*k*) 17 & 18 Vict. c. 31.

(*l*) *Vaughton v. L. & N. W. Ry. Co.* (1874), L. R. 9 Ex. 93; 43 L. J. Ex. 75.

(*m*) *McQueen v. G. W. Ry. Co.* (1875), L. R. 10 Q. B. 569; 44 L. J. Q. B. 130.

(*n*) *Machu v. L. & S. W. Ry. Co.* (1848), 2 Ex. 415; 17 L. J. Ex. 271.

(*o*) *Way v. G. E. Ry. Co.* (1876), 1 Q. B. D. 692; 45 L. J. Q. B. 874.

(*p*) 17 & 18 Vict. c. 31.

that no greater damages than 50*l.* for a horse, 15*l.* for any neat sheep, cattle per head, and 2*l.* for a sheep or pig, shall be recovered unless pigs, &c. a higher value has been previously declared.

Passengers' Luggage.

BUNCH *v.* GREAT WESTERN RAILWAY CO. [78.]
(1888)

[13 APP. CAS. 31 ; 57 L. J. Q. B. 361.]

The plaintiff arriving at Paddington Station, more than half-an-hour before her train was timed to start, entrusted to a porter, on his assurance that it would be quite safe in his custody, a Gladstone bag, which she expressed a wish to have in the carriage with her. She then "went away" for ten minutes to meet her husband on the premises of the company, and to get a ticket. When she returned, the bag, which had not been put in the railway carriage at all, was missing. For this loss the Great Western Railway Company were held liable.

In this leading case Lord Halsbury, L.C., and Lords Watson, Herschell, and Macnaghten (Lord Bramwell dissenting), expressed the opinion that a railway company accepting passengers' luggage *to be carried in a carriage with the passenger*, enter into a contract as *common carriers, subject to this modification*, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. The result of this case is to disapprove the reasoning in *Bergheim v. Great Eastern Railway Co.* (*q*), and to approve that of *Richards v. London, Brighton and South Coast Railway Co.* (*r*), *Talley v. Great Western Railway Co.* (*s*), and *Butcher v. London*

(*q*) (1878), 3 C. P. D. 221 ; 47 L. J. C. P. 318. See an able discussion of this subject in the Law Quarterly Review, 1886, p. 469.

(*r*) (1849), 7 C. B. 839 ; 18 L. J. C. P. 251.

(*s*) (1870), L. R. 6 C. P. 44 ; 40 L. J. C. P. 9.

and South Western Railway Co. (*t*); and to decide that, in the absence of contributory negligence on the part of the passenger, railway companies are insurers of luggage carried in the traveller's own compartment, as well as of that carried *in the van*.

Personal luggage, what is.

Such luggage, however, must not be *merchandise*, but simply the *personal luggage* of the passenger. So far as a rule can be extracted from a number of conflicting decisions, by "personal luggage" is meant *whatever the traveller takes with him for his personal use and convenience, according to the habits and wants of his class, either with reference to the immediate necessities, or to the ultimate purpose, of his journey* (*u*). About most of the things that sensible people are in the habit of taking with them on journeys there can, of course, be no dispute. But the *bedding* which a man is carrying with a view to the time when he shall have provided himself with a home (*u*), the *sketches* of an artist (*x*), the *title-deeds* of a client which a solicitor is taking to produce at a trial (*y*), and a *toy rocking-horse* (*z*), have been held *not* to be personal luggage. An eminent county court judge has held that a *hamper of fowls, apples, and vegetables, intended as a present to a friend*, is personal luggage (*a*); but the decision appears to be hardly consistent with the authorities.

If the company carry goods without objection, though well aware that they are not personal luggage, they will be liable (*b*).

Porters taking charge of luggage.

A company employing porters in the usual way are responsible for passengers' luggage, not merely while it is being carried on the journey, but also while it is in course of translation from cab to train or train to cab (*c*). There seems, however, to be a little doubt on the subject of luggage left on the platform, even though a porter may have taken charge of it. The London and North Western have been held (*d*) not liable for the loss of a portmanteau which an intending passenger from Manchester to Hull gave to a porter on arriving in a cab at the Manchester station. The porter left the portmanteau on the platform, where the intending passenger found it soon afterwards; and, as he could not find another porter, he

Agrell's case.

(*t*) (1855), 16 C. B. 13; 24 L. J. C. P. 137.

(*u*) *Macrow v. G. W. Ry. Co.* (1871), L. R. 6 Q. B. 612; 40 L. J. C. P. 300.

(*x*) *Mytton v. Midl. Ry. Co.* (1859), 4 H. & N. 615; 28 L. J. Ex. 398.

(*y*) *Phelps v. L. & N. W. Ry. Co.* (1865), 19 C. B. N. S. 321; 34 L. J. C. P. 259.

(*z*) *Hudston v. Midl. Ry. Co.* (1869), L. R. 4 Q. B. 366; 38 L. J. Q. B. 213.

(*a*) *Case v. L. & S. W. Ry. Co.* (1880), 68 L. T. 176.

(*b*) *Cahill v. L. & N. W. Ry. Co.* (1861), 13 C. B. N. S. 818; 31 L. J. C. P. 271; and *G. N. Ry. Co. v. Shepherd* (1852), 8 Ex. 30; 21 L. J. Ex. 286.

(*c*) *Richards v. L. B. & S. C. Ry. Co.*; *Butcher v. L. & S. W. Ry. Co.*; and *Bunch v. G. W. Ry. Co.*, *supra*.

(*d*) *Agrell v. L. & N. W. Ry. Co.*, *printed in a note to Leach v. S. E. Ry. Co.* (1876), 34 L. T. 134.

labelled it himself. Then he went away for a little time; and when he came back the portmanteau had disappeared. But the court seems to have thought that if, on arriving at the station, the traveller had said "Hull," and the porter had replied "All right," the company would have been responsible; and indeed this point would seem to be clear from the case of *Lovell v. London, Chatham and Dover Railway* (*e*). The only thing is, you must not go to a station about two hours before your train starts, and expect the railway company to be insurers of your luggage all that time.

Lovell's case.

In a modern case (in which a lady's maid coming from Malvern lost her box at Paddington), it has been held that, in regard to a passenger's luggage on the train's arriving at the station he gets out at, it is the company's duty to have the luggage ready at the usual place of delivery, while it is the passenger's duty to remove it within a reasonable time (*f*). After that it would seem that the company's liability is that of warehousemen (*g*).

The lady's maid's case.

Hodkinson v. L. & N. W. Ry. Co. (*h*) was the case of an unfortunate governess who lost her box. She arrived at a station of the defendants (Ashton-under-Lyne), and one of the company's porters took her luggage from the van. "Would she have a cab?" "No, she would walk and send for her luggage." "All right, munn," said the porter, "I'll put them on one side, and take care of them." The governess went off, and so did the luggage; for two hours afterwards, when it was wanted, it could not be found. It was held that the company were not responsible for the loss. They had delivered the luggage in the proper way, and the woman's redelivery of it to the porter could not be taken to affect them. "*Patscheider v. Great Western Railway Company*," said Lord Coleridge, C. J., "is clearly distinguishable; there the plaintiff had no opportunity of taking possession of her box. Possibly the porter may be responsible for the loss; but the company clearly are not."

The governess's case.

In respect of articles deposited at the cloak room, a railway company's rights and liabilities are those of common carriers, and not merely those of warehousemen. "I think," said Collins, J., in a recent case (*i*), "that having regard to modern decisions and the

Cloak rooms.

(*e*) (1876), 45 L. J. Q. B. 476; 34 L. T. 127; see also *Welch v. L. & N. W. Ry. Co.* (1885), 34 W. R. 166.

(*f*) *Patscheider v. G. W. Ry. Co.* (1878), 3 Ex. D. 153; 38 L. T. 149. See also *Firth v. N. E. Ry. Co.* (1888), 36 W. R. 467.

(*g*) *Chapman v. G. W. Ry. Co.* (1880), 5 Q. B. D. 278; 49 L. J.

Q. B. 420; and see *Mitchell v. Lanc. & Y. Ry. Co.* (1875), L. R. 10 Q. B. 256; 44 L. J. Q. B. 107; and *Heugh v. L. & N. W. Ry. Co.* (1870), L. R. 5 Ex. 51; 39 L. J. Ex. 48.

(*h*) (1884), 14 Q. B. D. 228; 32 W. R. 662.

(*i*) *Singer Manufacturing Co. v. L. & S. W. Ry. Co.*, [1894] 1 Q. B.

rising standard of convenience to which railway companies are obliged to conform, the cloak room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their baggage." But companies are in the habit of attempting to vary the ordinary contract of bailment by issuing tickets containing conditions. If the customer reads the conditions and makes no objection, he will be bound by them; and so he will be if he is aware that there are conditions, and does not take the trouble to look at them, or thinks it better not to (*j*). But he will not be bound by the conditions if he did not read them and was not aware of their existence (*k*).

Watkins v. Rymill. A recent case of importance on the subject of special conditions on tickets, is *Watkins v. Rymill* (*l*), where the plaintiff had delivered to the defendant a waggonette to be sold, and had taken from him a printed form containing a receipt for the waggonette, followed by the words "*subject to the conditions as exhibited upon the premises.*" The plaintiff was held to be bound by the conditions, though he had put the document into his pocket without looking at it. On this case Sir Frederick Pollock, in his admirable book on "Contracts" (*m*), remarks, "Are reasonable means of knowledge equivalent to actual knowledge? It seems better on principle to say that actual knowledge may be inferred as a fact from reasonable means of knowledge, and inferred against the bare denial of the party whose interest it was not to know. This is one of the rules of evidence which are apt in particular departments to harden into rules of law, and the judgment in *Watkins v. Rymill* certainly tends in this direction. It would be curious, however, if, after 'constructive notice' has been justly discredited in equity cases, a new variety of it should be introduced in a question of pure common law."

Liability to whom. The liability of a railway company for passengers' luggage, it may be mentioned, is to the passenger travelling with it, though it may not be really his property. Thus, a man sending on his luggage by a servant cannot sue for its loss (*n*). So it does not matter who

833; 63 L. J. Q. B. 411. And see sect. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

(*j*) *Harris v. G. W. Ry. Co.* (1876), 1 Q. B. D. 515; 45 L. J. Q. B. 729.

(*k*) *Parker v. S. E. Ry. Co.* (1876), 2 C. P. D. 416; 46 L. J. C. P. 768; *Henderson v. Stevenson* (1875), L. R. 2 H. L. Sc. 470; 32

L. T. 709; *Richardson v. Rowntree*, [1894] A. C. 217; 63 L. J. Q. B. 283.

(*l*) (1883), 10 Q. B. D. 178; 52 L. J. Q. B. 121; and see *Woodgate v. G. W. Ry. Co.* (1884), 51 L. T. 826; 33 W. R. 428.

(*m*) 5th ed. p. 48 (*y*).

(*n*) *Beecher v. G. E. Ry. Co.* (1870), L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

paid the fare: a servant, for instance, can sue for loss of luggage though the ticket was taken by his master (*o*).

Companies sometimes issue tickets stating that they do not hold themselves responsible for loss or injury arising "*off their own lines*." To bring themselves within such a condition a railway company must show that the luggage when lost was *out of their custody*: so that if it is lost at a station which they have the use of by agreement with another company, they will not be protected (*p*). Loss off line.

Independently altogether of contract, the traveller may bring an action against a railway company who had taken his portmanteau to be carried, and then negligently lost it. Suing in tort.

In *Hooper v. L. & N. W. Ry. Co.* (*q*), the plaintiff had taken a G. W. through ticket from Stourbridge to Euston, changing at Birmingham into a train of the defendants. He saw his portmanteau transferred from the G. W. to the L. & N. W. train, but at Euston it was missing. Notwithstanding that his contract was with the G. W. people, he was held entitled to sue the L. & N. W. Co. as for a breach of duty. Hooper's case.

Trains behind Time, &c.

DENTON v. GREAT NORTHERN RAILWAY CO. [79.]

(1856)

[5 E. & B. 860; 25 L. J. Q. B. 129.]

On the 25th of March, 1855, Mr. Denton, an engineer of some eminence, had occasion to go from Peterborough to Hull, where he had an appointment for the next morning. He consulted the G. N. R. Company's time-tables, and found there was a train leaving Peterborough

(*o*) *Marshall v. York, &c. Ry. Co.* (1851), 11 C. B. 655; 21 L. J. C. P. 34; and see *Austin v. G. W. Ry. Co.* (1867), L. R. 2 Q. B. 442.

(*p*) *Kent v. Midl. Ry. Co.* (1874), L. R. 10 Q. B. 1; 44 L. J. Q. B. 18.

(*q*) (1880), 50 L. J. Q. B. 103; 43 L. T. 570; decided on the au-

thority of *Foulkes v. Met. Ry. Co.* (1880), 5 C. P. D. 157; 49 L. J. C. P. 361; and disregarding *Mytton v. Midl. Ry. Co.* (1859), 28 L. J. Ex. 398; 4 H. & N. 615, as an authority. See also *Elliott v. Hall* (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518.

at 7 p.m. which would land him at Hull about midnight. This just suited him, so he took his ticket for Hull and started by it. But when he got to Milford Junction, he was informed by an official that the late train to Hull had been discontinued, and that he could not get there that night. The fact was, that the line from Milford Junction to Hull belonged to the North Eastern Railway Company, who till March 1st had run a train departing a few minutes after the arrival of the train leaving Peterborough at 7 p.m. But it had not run at all during March, and the Great Northern Railway Company had published their March time-tables, though they had had notice that it would not run. In consequence of the absence of this train, Mr. Denton did not get to Hull in time to keep his appointment, and sustained damage to the amount of 5*l.* 10*s.*, for which he sought to make the Great Northern Railway Company liable. He was successful. The company were held liable, on the grounds—

1st. That they had been guilty of a false representation. “It is all one,” said Lord Campbell, “as if a person duly authorized by the company had, knowing it was not true, said to the plaintiff, ‘There is a train from Milford Junction to Hull at that hour.’ The plaintiff believes this, acts upon it, and sustains loss. It is well-established law that where a person makes an untrue statement, knowing it to be untrue, to another, who is induced to act upon it, an action lies. The facts bring the present case within that rule.”

2nd. That the time-tables amounted to a contract.

LE BLANCHE *v.* LONDON & NORTH WESTERN [80.]
RAILWAY CO. (1876)

[1 C. P. D. 286; 45 L. J. C. P. 521.]

Mr. Le Blanche was a business man, who, in August, 1874, like a great many other hard-working individuals, decided to spend a fortnight at Scarborough. He took a first-class ticket of the London and North Western Company to go from Liverpool to Scarborough by the 2 p.m. train, which, the time-tables told him, would arrive at Scarborough at 7.30 p.m. Mr. Le Blanche's journey lay by Leeds and York, at each of which places it was necessary for him to change and get into a train *not* belonging to the London and North Western Company. The train was 27 minutes late at Leeds, and, in consequence of that, Mr. Le Blanche missed the train he ought to have caught, and did not arrive at York till 7 o'clock, which was too late for the train on, which arrived at Scarborough at 7.30. On inquiry, he was informed that the next train would leave York at 8 and get to Scarborough at 10. Most men under these circumstances would have spent an hour in dining, or looking at the old city. Not so Mr. Le Blanche. He instantly ordered a special train, and arrived at Scarborough about half-past eight.

He now brought an action to recover the money he had paid for the special train—nearly 12*l.*—but in spite of the delay being traced to negligence, he did not get the money, because, though it is a sound principle of law that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be and charge him for the reasonable expense incurred in so doing, *yet he may not perform it unreasonably and oppressively*, and it was ridiculous for a man to take a

special train merely for the purpose of getting to a pleasant place an hour earlier.

Common law duty.

The duty of a carrier of passengers at common law is simply to deliver them at their destination within a reasonable time; and it has been expressly held that the mere granting of a ticket imposes on a railway company no obligation to have a train ready to start at a definite time (*r*).

Varied by time-tables.

But railway companies invariably issue time-tables and conditions so as to vary their common law liability; and the issue of such time-tables amounts to an express contract with the public. The usual condition which the companies seek to enforce is that "*though every attention will be paid to ensure punctuality, they do not warrant the departure or arrival of the trains at the times specified in the time-bills*"; and the meaning of this and similar conditions is frequently discussed. On the whole it is clear that a company cannot contract itself in this way out of its liability to be reasonably punctual. But, on the other hand, it is not to be held liable *merely because a train is late*. It must be affirmatively shown that the lateness is due to neglect to pay the "every attention" which is

"Every attention."

Unavoidable lateness.

promised. No doubt the extreme lateness of a train would suggest a presumption of such negligence; but it would be open to the company to rebut it by showing that it was due to a fog or a strong wind, or the slippery state of the rails, or a flood, or to some other circumstance over which they had no control (*s*).

Mr. Woodgate's Christmas Eve.

The recent case of *Woodgate v. The Great Western Railway Company* (*t*) is of importance on this branch of the law. The plaintiff, Mr. Woodgate, was a barrister, who on Christmas Eve, 1881, took a first-class return ticket from Paddington to Bridgnorth, a station on a branch line of the defendants. The ticket had "*See back*" on one side (only on the return half), and "*Issued subject to the conditions stated on the company's time bills*" on the other. The "time bills" were published monthly in a book of about one hundred pages, and on the first page was a notice, headed "*Train Bills*," that the company would not be accountable for injury which might arise from delays, unless in consequence of the wilful misconduct of the company's servants. By reason of its being Christmas time, of the weather being foggy, and of there having been a collision some hours before, Mr. Woodgate did not arrive at his destination so speedily as he could have wished. In fact, his

(*r*) *Hurst v. G. W. R. Co.* (1865), 19 C. B. N. S. 310; 34 L. J. C. P. 264.

(*s*) See *Fitzgerald v. Midl. Ry.*

Co. (1876), 34 L. T. 771.

(*t*) (1884), 51 L. T. 826; 33 W. R. 428; and see *McCartan v. N. E. Ry. Co.* (1885), 54 L. J. Q. B. 441.

journey took ten hours instead of six as advertised. In an action which he proceeded to bring against the railway company, it was held, upon a special case, that the conditions on the time bills were incorporated in the plaintiff's contract with the company, and that there was no evidence of their wilful misconduct or liability. "I hold," said Smith, J., "in accordance with the decision in the case of *Le Blanche v. London and North Western Railway Company*, that the taking of the ticket, the time-table, and the conditions formed the contract under which the Great Western Railway Company undertook to carry Mr. Woodgate. Then, that being my opinion, the question arises, what is the meaning of the contract? . . . I think no man can read this clause without coming to one conclusion. It does not say, 'We will be liable in no case,' but it simply says this: 'If you, as a passenger, have incurred any loss, inconvenience, or injury by reason of delay or detention, we will compensate you if you prove it is by the wilful misconduct of our servants, but otherwise not.'"

An action may be maintained by a traveller for whom, though the train starts as advertised, there is no room. "This was held in the

case of *Hawcroft v. Great Northern Railway Company* (*u*), where the plaintiff was a Barnsley confectioner, who took an excursion return ticket to go up to London and see the Great Exhibition of 1851. The excursion train by which he proposed on a Saturday morning to return was so full that he could not get a seat, and, as the company would not allow him to go by one of their ordinary trains, he was kept at King's Cross station till late in the evening. When at last he did get a train, he found that it took him no further than Doncaster, where he arrived on Sunday morning. The Barnsley confectioner, however, wanted to get back to his family as quickly as possible, so (there being no Sunday trains) he hired a carriage and drove from Doncaster to Barnsley. Under these circumstances the company were held liable. 'I do not think,' said Patterson, J., 'that they had any right to keep him in London until the 9.45 evening train. They should have sent another train. The case finds that they might have done so without danger.'"

Assuming that an action lies, there is a further question as to the damages obtainable. It is a clear rule that *damages cannot be obtained for the loss of a business engagement*, such loss not being in the contemplation of both parties at the time of contracting. The case of *Buckmaster v. The Great Eastern Railway Company* (*x*),

(*u*) (1852), 21 L. J. Q. B. 178; 16 Jur. 196.

(*x*) (1870), 23 L. T. 471. And see *Cooke v. Midl. Ry. Co.* (1893), 57 J. P. 388, where a miner was

held entitled to recover a day's wages which he had lost owing to an unreasonable delay in the starting of a train.

No room.

The Barnsley confectioner's trip to London.

What damages.
Business engagement.
The miller's case.

Annoy-
ance.
Incon-
venience.
Mrs.
Hobbs's
cold.

where a Suffolk miller who missed his market recovered 10*l.* in respect of loss of business, is not really a violation of this rule, because probably the train was specially run on the particular day and at the particular time to enable people to attend the Mark Lane Corn Market, and it was for that purpose, as the company knew, that the plaintiff had taken a season ticket. Nor can damages be obtained for the *disappointment and annoyance* which the traveller will naturally feel. But damages may be obtained for *personal inconvenience*. A well-known case on this point is *Hobbs v. The London and South Western Railway Company* (*y*), where a family party took tickets on the defendants' railway to go from Wimbledon to Hampton Court by the midnight train. They got into the train, but, unluckily for them, it did not go to Hampton Court, but went along the other branch to Esher, where they were unable to get either a conveyance or accommodation for the night. Accordingly, though it was a nasty wet night, they had to tramp it home, not arriving till about three o'clock in the morning; and, as one of the results, the wife caught cold and was laid up for a long time, being unable to assist her husband in his business, and having to have a doctor. In an action by the husband and wife against the company it was held that they were entitled to damages for the inconvenience suffered in consequence of being obliged to walk home, but *not for the illness* and its consequences. This distinction, however, was pretty freely commented on by the Court of Appeal in *McMahon v. Field* (*z*), where the plaintiff's horses had been turned out of an innkeeper's stables, through that person breaking his contract, and had caught cold owing to the exposure. It was held that the damage in respect of such cold was recoverable, as it was *the probable consequence* of the defendant's breach of contract, and was not, therefore, too remote. "In *Hobbs v. London and South Western Railway Company*," said Bramwell, L. J., "it was said that the damage to the wife was a secondary consequence of the breach of contract and too remote; and by way of illustration the case was given of a person walking home in the dark, who took a false step, which resulted in a fall and a broken limb; but I must say I do not see why a passenger who, by the default of the railway company, was obliged to walk home in the dark, might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur." "Then it is said," added Brett, L. J., "that the case is governed by that of *Hobbs v. London and South Western Railway Company*. Now, I must confess that, if I

(*y*) (1875), L. R. 10 Q. B. 111;
44 L. J. Q. B. 49.

(*z*) (1881), 7 Q. B. D. 591; 50
L. J. Q. B. 852.

acquiesce in that case, I cannot quite agree with it. What were the facts there? . . . The wife, in consequence of the exposure, caught a cold, and it was said that such damage was too remote to be recovered. Why was it too remote? . . . Suppose a man let lodgings to a woman, and then turned her out in the middle of the night with only her night-clothes on, would it not be a natural consequence that she would take cold? The Lord Justice, however, distinguished the two cases in this way, "People do get out of a train and walk home at night without catching cold, and it is not nearly so inevitable a consequence that a person getting out of a train under such circumstances as in *Hobbs v. London and South Western Railway Company* should catch cold as that horses turned out, as these were in this case, should suffer. There is, therefore, a difference, though I own I do not see much, between this case and that of *Hobbs v. London and South Western Railway Company*." *Hotel expenses* entailed by the breach of contract may be recovered (a). Moreover, on the principle that, when a contracting party fails to perform his engagement, the other may perform it for himself, and send in his bill, provided he does not perform it oppressively and unreasonably, the traveller may take a carriage or special train, and charge it to the company. A rough test that might be applied as to the oppressiveness is,—*supposing this person had had to pay the money out of his own pocket, would he have been in such a hurry to get to his destination?*

The Hobbs case.

Hotel expenses.

Special train.

See further as to the duties of carriers of passengers, *Readhead v. Midland Railway Co.*, *post*, p. 367.

Contract of Sale.

TARLING *v.* BAXTER. (1827)

[81.]

[6 B. & C. 360; 9 D. & R. 272.]

On January 4th, 1825, it was in writing agreed between Mr. Baxter and Mr. Tarling that the former should sell to the latter a stack of hay then standing in Canonbury Field, Islington, at the price of 145*l.* Payment was to be

(a) *Hamlin v. G. N. Ry. Co.* (1856), 1 H. & N. 408; 26 L. J. Ex. 20.

made on February 4th, but the stack was to be allowed to remain where it was till May Day. It was not to be cut till paid for. This was held to be an immediate not a prospective sale, so that when on January 20th the stack was accidentally burnt down, the loss fell on Tarling the buyer. "The rule of law," said Bayley, J., "is that where there is an immediate sale nothing remains to be done by the vendor as between him and the vendee; the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that, if it be destroyed, the loss falls on the vendee."

[82.]

ACRAMAN v. MORRICE. (1849)

[8 C. B. 449; 19 L. J. C. P. 57.]

Morrice, a timber merchant, agreed to buy from one Swift the trunks of certain oak-trees belonging to Swift and lying at his premises at Hadnock, in Monmouthshire. He marked out the timber he wanted and paid for it, and it only remained for Swift to *sever the parts not wanted* and send off the rest to the purchaser. Unfortunately, just then Swift became bankrupt. On hearing of his bankruptcy, Morrice sent his men to Hadnock, and had all the timber he had paid for carried off. Swift's assignees, however, of whom Mr. Acreman was the leading spirit, objected to this proceeding, as they considered that the property in the timber had not passed to Morrice, Swift not having severed the boughs. This contention prevailed, Wilde, C. J., saying, "Upon a contract for the sale of goods, so long as anything remains to be done to them by the seller, the property does not pass, and the seller has a

right to retain them. In the present case several things remained to be done. The buyer, having selected and marked the particular parts of the trees which he wished to purchase, it became the seller's duty to sever those parts from the rest, and to convey them to Chepstow, and there deliver them at the purchaser's wharf. . . The property clearly had not passed to the defendant, and he was guilty of a trespass and a conversion in possessing himself of it in the way he did."

When the subject-matter of a sale is clear and ascertained at the time of the contract and the price is fixed, the property in the thing sold, with all the risks, passes at once to the purchaser. To this rule, which *Tarling v. Baxter* illustrates, *Acraman v. Morrice* supplies us with an exception, viz., that *when something remains to be done by the seller, the property does not pass*. Thus, when goods, part of an entire bulk, are sold, the property in such goods does not pass until they are separated from the bulk, that is, there must be appropriation of a specific portion (*b*). Something remaining to be done by seller.

Where the sale is of a chattel to be made by the seller the property does not, as a general rule, pass until the chattel is actually made and approved by the buyer. But the question whether or no the property had passed is purely one of *intention*, to be collected from all the circumstances. A Mr. Pocock ordered a boat-builder to build him a barge. The boat-builder set about it; he was paid money on account as the work proceeded, and by and by the name of Mr. Pocock duly appeared painted on the stern. In spite of all this, it was held that the property in the barge had not passed, and, the boat-builder having become bankrupt, that it belonged to his assignees (*c*). With this may be usefully compared a somewhat later case (*d*), in which a ship-builder agreed to build a ship for a firm of merchants, the building as it proceeded to be superintended Mucklow v. Mangles.
Clarke v. Spence.

(*b*) *Dixon v. Yates* (1833), 5 B. & Ad. 313; 2 N. & M. 177.

(*c*) *Mucklow v. Mangles* (1808), 1 Taunt. 318; and see *Atkinson v. Bell* (1828), 8 B. & C. 277; 2 M. & R. 292; and the recent case of *Bellamy v. Davey*, [1891] 3 Ch. 540; 60 L. J. Ch. 778, where it was held that the fact that the subject-matter of the contract (a petrolenm tank) was *to be made on the premises of the purchaser* did not make the

property vest in the purchaser until completion. It should be noted, however, that the tank was not fixed to the soil, though, when completed, it would be too heavy to be moved without being taken to pieces.

(*d*) *Clarke v. Spence* (1836), 4 Ad. & E. 470; 6 N. & M. 399; and see *Inglis v. Stock* (1885), 10 App. Ca. 263; 54 L. J. Q. B. 582.

by an agent of the merchants' firm. A price was fixed, and it was arranged that payment should be made by instalments regulated by particular stages in the progress of the work. The Court held that the property in the materials vested in the purchaser at the time when they were put together under the approval of the superintendent, or, at all events, when the first instalment was paid. Here, the fact of the superintendence by the purchasers' agent would seem important to show an intention to pass the property as the work proceeded, for, otherwise, when one vessel had been nearly constructed the superintendent might have been called upon to begin *de novo* and superintend the building of a second. The principles applicable to the sale of part of a ship are equally applicable to the sale of part of any *corpus manufactum* in course of construction. It is quite competent for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage; and it is a question of construction in each case at what stage the property shall pass, and a question of fact whether that stage has been reached. On the other hand, materials provided by the builders as portions of the fabrics, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been "affixed," or in a reasonable sense made part of the *corpus*. The case of *Seath v. Moore* (1886), 11 App. Cas. 350; 55 L. J. P. C. 54, should be consulted on this subject. And see *Bellamy v. Davey*, *supra*.

Sale of
Goods Act,
1893.

The law as to the transfer of property on the sale of goods has recently been codified in the following sections of the Sale of Goods Act, 1893 (c):—

Goods
must be
ascertained.

Sect. 16. "Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

The following cases may be referred to as illustrating this section, namely:—*Wallace v. Breeds* (1811), 13 East, 522; 1 Rose, 109; *Austen v. Craven* (1812), 4 Taunt. 644; 1 Marsh. 4, n.; *White v. Wilks* (1813), 5 Taunt. 176; 1 Marsh. 2; *Busk v. Davis* (1814), 2 M. & S. 397; 5 Taunt. 622, n.; *Shepley v. Davis* (1814), 5 Taunt. 617; 1 Marsh. 252; *Rohde v. Thwaites* (1826), 6 B. & C. 388; 9 D. & R. 293; *Aldridge v. Johnson* (1857), 7 E. & B. 885; 26 L. J. Q. B. 296; *Gabarron v. Kreeft* (1867), L. R. 10 Ex. 274; 44 L. J. Ex. 238.

Property
passes
when in-
tended to
pass.

Sect. 17. "(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

“(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.”

This section is illustrated by the following cases, namely: Bishop *v.* Shillito (1819), 2 B. & A. 329, a; Lanyon *v.* Toogood (1844), 13 M. & W. 29; Sleddon *v.* Cruickshank (1846), 16 M. & W. 71; Cohen *v.* Foster (1892), 61 L. J. Q. B. 643.

Sect. 18. “Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

Rules for ascertaining intention.

“Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.”

See Tarling *v.* Baxter, *supra*; Gilmour *v.* Supple (1858), 11 Moo. P. C. 551; and per Lord Blackburn in Seath *v.* Moore, *supra*.

“Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, *and the buyer has notice thereof*” (*f*).

As illustrating this rule, the following cases may be referred to, namely: Acraman *v.* Morrice, *supra*; Rugg *v.* Minett (1809), 11 East, 210; Greaves *v.* Hepke (1818), 2 B. & A. 131; Woods *v.* Russell (1822), 5 B. & A. 942; 1 D. & R. 58; Swanwick *v.* Sothorn (1839), 9 A. & E. 895; 1 P. & B. 648; Wood *v.* Bell (1856), 6 E. & B. 355; 25 L. J. Q. B. 321; Turley *v.* Bates (1863), 2 H. & C. 200; 33 L. J. Ex. 43.

“Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, *and the buyer has notice thereof*” (*f*).

See the following illustrations, namely: Zagury *v.* Furnell (1809), 2 Camp. 240; Simmons *v.* Swift (1826), 5 B. & C. 857; 8 D. & R. 693; Tansley *v.* Turner (1835), 2 B. N. C. 151; 2 Scott, 238; Swanwick *v.* Sothorn, *supra*; Kershaw *v.* Ogden (1865), 3 H. & C. 717; 34 L. J. Ex. 159.

“Rule 4. When goods are delivered to the buyer on approval or

(*f*) The provision as to notice to the buyer of acts done by the seller to pass the property effects a change in the law, as this was not necessary prior to this Act.

on 'sale or return' or other similar terms, the property therein passes to the buyer:—

“(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

“(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.”

See the following illustrations, namely: *Ellis v. Mortimer* (1805), 1 B. & P. N. R. 257; *Swain v. Shepherd* (1832), 1 M. & Rob. 223; *Beverley v. Lincoln Gas Co.* (1837), 6 A. & E. 829; 2 N. & P. 283; *Head v. Tattersall* (1871), L. R. 7 Ex. 7; 41 L. J. Ex. 4; *Ex parte White* (1879), L. R. 6 Ch. 397; 21 W. R. 465; *Elphick v. Barnes* (1880), 5 C. P. D. 321; 49 L. J. C. P. 698; *per cur.* in *Ex parte Wingfield* (1879), 10 Ch. D. 591; 40 L. T. 15.

“Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

“(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.”

Goods are in a “deliverable state” when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. See sect. 62 (1).

As to part (1) of this rule, see *Rohde v. Thwaites* (1827), 6 B. & C. 388; 9 D. & R. 293; *Elliot v. Pybus* (1834), 10 Bing. 512; 4 M. & S. 389; *Wilkins v. Bromhead* (1844), 6 M. & G. 963; 13 L. J. C. P. 74; *Godts v. Rose* (1855), 17 C. B. 229; 25 L. J. C. P. 61; *Jenner v. Smith* (1869), L. R. 4 C. P. 270; *Borrowman v. Free* (1878), 4 Q. B. D. 500; 48 L. J. Q. B. 65.

As to part (2) of the rule, reference may be made to *Dutton v. Solomonson* (1803), 3 B. & P. 582; *Ogle v. Atkinson* (1814), 5 Taunt. 759; 1 Marsh. 323; *Fragano v. Long* (1825), 4 B. & C. 219; 6 D. & R. 283; *Dunlop v. Lambert* (1839), 6 C. & F. 600; *Aldridge v. Johnson* (1857), 7 E. & B. 885; 26 L. J. Q. B. 296.

Sect. 19. "(1.) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Reserva-
tion of
right of
disposal.

"(2.) Where goods are shipped, and, by the bill of lading, the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

"(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him."

The following cases illustrate this section, namely: *Jenkyns v. Brown* (1849), 19 L. J. Q. B. 286; 14 Q. B. 496; *Godts v. Rose* (1855), 25 L. J. C. P. 61; 17 C. B. 229; *Browne v. Hare* (1858), 4 H. & N. 822; 29 L. J. Ex. 6; *Joyce v. Swan* (1864), 17 C. B. N. S. 84; *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; 40 L. J. Q. B. 148; *Ex parte Banner* (1876), 2 Ch. D. 278; 45 L. J. Bk. 73; *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164; 47 L. J. Ex. 418; *Cohen v. Foster* (1892), 61 L. J. Q. B. 643; 66 L. T. 616.

Sect. 20. "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Risk
prima facie
passes with
property.

"Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

"Provided also, that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party."

As illustrating this section, see *Tarling v. Baxter*, *supra*; *Fragano v. Long* (1825), 4 B. & C. 219; 6 D. & R. 283; *Alexander v. Gardner* (1835), 1 Scott, 281, 630; 1 B. N. C. 671; *Bull v. Robison* (1854), 10 Ex. 342; 24 L. J. Ex. 165; *Castle v. Playford* (1870), L. R. 7 Ex. 98; 41 L. J. Ex. 44; *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436; 41 L. J. Q. B. 227; *Calcutta Co. v. De Mattos* (1863), 33 L. J. Q. B. 214.

Property
without
possession.

It is to be noted that, although the property in a chattel may be in the vendee, so as to make the loss fall on him if the thing were to perish, yet he may not be entitled to the possession. Thus, in the case quoted above of *Clarke v. Spence*, we have seen that the property in the materials passed to the purchaser as the building of the ship proceeded, but the builder, nevertheless, had a right to retain the fabric in order to complete it and earn the rest of the price. So, too, in a ready-money sale the vendor has a lien for the price. But, when goods are sold on credit, and nothing is said as to the time of delivery, the purchaser is entitled to immediate possession, both the right of property and the right of possession vesting in him at once.

A learned and exhaustive discussion of the numerous cases illustrating the above principles is contained in "*Benjamin on Sale*," see 4th edition, p. 277.

Stoppage in Transitu.

[83.]

LICKBARROW *v.* MASON. (1788)

[2 T. R. 63; 1 H. BL. 357; 5 T. R. 683.]

Freeman of Rotterdam, sent an order to Messrs. Turings, of Middleburg, to ship a quantity of corn to Liverpool. This order Messrs. Turings were rash enough to execute: for they then considered Freeman to be, if not "the richest merchant in Rotterdam," at all events, a safe and solvent person. On July 22nd, 1786, Messrs. Turings put the corn on board the ship "Endeavour," whereof the master was a Mr. Holmes. It is the duty of a master when he sets out on a voyage like this to sign bills of lading, by way of acknowledging that he has got the goods on board. Holmes signed four of these bills of lading (usually, it may be remarked, only three are signed); and of the four one he pocketed, two were endorsed in blank by Turings & Co. and sent to Freeman with an invoice

of the goods shipped, and the fourth was retained by Messrs. Turings.

The sound ship "Endeavour" had not set sail very long when tidings came to the ears of the Turings that Freeman had become bankrupt. Rising to the occasion, they immediately sent off the bill of lading that remained in their custody to Messrs. Mason & Co., of Liverpool, with a special endorsement to deliver the corn to them for Messrs. Turings' benefit. Pursuant to this special indorsement, Mr. Holmes, when he arrived at Liverpool, delivered his cargo to the Masons. In the meantime, however, and before he became bankrupt, Freeman had sent his two bills of lading to Messrs. Lickbarrow duly negotiated for a valuable consideration. Messrs. Lickbarrow, therefore, were anything but pleased to find that Mason & Co. had got hold of the corn, and they brought this action to try and make them give it up. In this they were successful. Judgment was given for the plaintiffs, on the ground that *a bonâ fide assignment of the bills of lading defeats the vendor's right to stop in transitu*.

The unpaid vendor of goods has a right, on the insolvency of the vendee, to stop the goods and retake possession of them while on their way, and to retain them until payment or tender of the price (*g*). The right to stop is personal to the vendor; and cannot, for example, be exercised by a surety for the price of the goods (*h*). But, any time before the *transitus* is over, the vendor may ratify the act of a stranger who has stopped the goods (*i*); and a person who sends goods to be sold on the joint account of himself and his consignee may stop (*k*). The vendor may retake the goods, though he holds the consignee's acceptance, and without returning the bill (*l*). Who may stop.

In most stoppage *in transitu* cases the difficulty is to know whether the journey was at an end or not. The principle to be

(*g*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41.

(*h*) Siffken v. Wray (1865), 6 East, 371.

(*i*) Bird v. Brown (1850), 4 Ex. 786; 19 L. J. Ex. 154.

(*k*) Newsom v. Thornton (1805), 6 East, 17; 2 Smith, 207; and see Feise v. Wray (1802), 3 East, 93.

(*l*) Edwards v. Brewer (1837), 2 M. & W. 375.

The trans-
situs.

Pur-
chaser's
ship.

Lyons v.
Hoffnung.

Arrival at
interme-
diate
station.

deduced from the cases is that the *transitus* is not at an end till the goods have reached the place named by the buyer to the seller as the place of their destination (*m*), even though the goods be carried in a ship chartered by the buyer (*n*). If, however, the ship is the *buyer's own*, the goods cannot generally be taken (*o*). Reference should be made to the recent case of *Lyons v. Hoffnung* (*p*), where it was held that where goods are intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier, to be carried to a destination contemplated at the time of purchase by both parties, and, though held by the carrier as the purchaser's agent, they are still *in transitu* till the destination is reached, even although the delivery to the carrier has been made in such sense as to pass the property to the purchaser as owner. "The law appears," said Lord Herschell, "to be very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell v. Clark* (*q*). He says, 'When the goods have not been delivered to the purchaser or to any agent of his to hold for him, otherwise than as a carrier, but are still in the hands of the carrier as such, and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu*, and may be stopped.' " And, though the goods remain in the hands of the carrier, the *transitus* may nevertheless be over; as, for instance, where the vendee pays the carrier a rent for warehousing (*r*), or where he has done something equivalent to taking possession (*s*), or where "after the arrival of the goods at the appointed destination, the carrier acknowledges to the buyer that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, and it is immaterial that a further destination for the goods may have been indicated by the buyer" (*t*). The *transitus*, however, is not determined by the goods arriving *at an intermediate*

(*m*) *Coates v. Railton* (1827), 6 B. & C. 427; 9 D. & R. 593.

(*n*) *Berudtson v. Strang* (1867), L. R. 3 Ch. 588; 37 L. J. Ch. 665; *Ex parte Rosevear China Clay Co.*, *Re Coek* (1879), 11 Ch. D. 560; 48 L. J. Bk. 100; *Brindley v. Cilgwyn Slate Co.* (1885), 55 L. J. Q. B. 67. See, however, the recent case of *Bethell v. Clark* (1888), 20 Q. B. D. 615; 57 L. J. Q. B. 302; and see sect. 45 (5) of the Sale of Goods Act, 1893.

(*o*) *Schotsmans v. Lane., &c. Ry. Co.* (1867), L. R. 2 Ch. 332; 36 L. J. Ch. 361.

(*p*) (1890), 15 App. Cas. 391; 59 L. J. P. C. 79.

(*q*) *Supra*.

(*r*) *Dixon v. Baldwin* (1804), 5 East, 174; and see *Ex parte Barrow* (1877), 6 Ch. D. 783; 46 L. J. Bk. 71; *Miles's case* (1885), 15 Q. B. D. 39; 54 L. J. Q. B. 566.

(*s*) *Ellis v. Hunt* (1789), 3 T. R. 461; and see *Foster v. Frampton* (1826), 6 B. & C. 107; 2 C. & P. 469; and *Ex parte Hughes* (1893), 67 L. T. 598; 9 M. B. R. 294.

(*t*) Sect. 45 (3) of the Sale of Goods Act, 1893.

stage, unless they are to be thenceforward at the orders of the buyer and in the hands of persons who are to keep them for him (*v*). In the modern case of *Kendal v. Marshall* (*x*), goods had been sent by an unpaid vendor through a carrier to a forwarding agent appointed by the purchaser, and who received his orders from the purchaser and not from the vendor; and it was held that the transit of the goods, upon reaching the hands of the forwarding agent, was at an end, and the right to stop *in transitu* lost, even although the goods might have been intended to be sent to an ulterior and subsequent destination. Bowen, L. J., said, in giving judgment in this case, "In *Coates v. Railton*, several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is, that where goods are sold to be sent to a particular destination, the *transitus* is not at an end until the goods have reached the place named by the vendee to the vendor as their destination. One exception, at least, is to be found in the principle here laid down: the vendee can always anticipate the place of destination, if he can succeed in getting the goods out of the hands of the carrier. In that case the transit is at an end, whatever may have been said as to the place of destination, and *this shows that the real test is not what is said, but what is done.*" The vendee therefore may shorten the *transitus* by going out to meet the goods, and taking them from the carrier; but a mere demand, even though backed by the production of a delivery order, will not be sufficient to defeat the right to stop (*y*). On the other hand, the carrier may not prolong the transit so as to give the vendor an increased right of stoppage; and if the carrier wrongfully refuses to deliver the goods to the buyer the transit is deemed to be at an end (*z*).

Vendee
meeting
goods.

To stop the goods, it is not necessary for the vendor to lay corporeal touch on them. It is sufficient if he gives notice to those who have the immediate custody of the goods; or, if to their employers, so that they may have reasonable time to communicate it to such persons in time to prevent a delivery to the buyer (*a*).

How to
stop.

The stopping of part of the goods consigned has no effect on the Stopping

(*v*) *Smith v. Goss* (1808), 1 Camp. 282; *Mills v. Ball* (1801), 2 B. & P. 457.

(*x*) (1883), 11 Q. B. D. 356; 52 L. J. Q. B. 313; and see *Bethell v. Clark*, *supra*.

(*y*) *Whitehead v. Anderson* (1842), 9 M. & W. 518; 11 L. J. Ex. 157; and see *Coventry v. Gladstone* (1868), L. R. 6 Eq. 41; 37 L. J. Ch. 492; and see sect. 15 (2) of the

Sale of Goods Act, 1893.

(*z*) Sect. 45 (6) of the Sale of Goods Act, 1893; and *Bird v. Brown* (1850), 4 Ex. 786; 19 L. J. Ex. 154.

(*a*) *Whitehead v. Anderson*, *supra*. See also *Phelps v. Comber* (1885), 29 Ch. D. 813; 54 L. J. Ch. 1017; and sect. 46 of the Sale of Goods Act, 1893.

or de-
livering
part.

remainder, though the contract is entire (*b*). On the other hand, the *delivery of a part* of goods sold under one entire contract, if such delivery of part was made under such circumstances as to show an agreement to give up possession of the whole of the goods, *will defeat the right to stop* (*c*).

“If the goods are rejected by the buyer, and the carrier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back” (*d*).

Assign-
ment of
bill of
lading.

The most usual way, however, in which the vendor's right is defeated is by the absolute assignment of a bill of lading or other document of title to a *bonâ fide* assignee for a valuable consideration. An assignment, however, by the consignee of a document of title by way of pledge will not defeat the vendor's right, subject to the pledge (*e*). The effect on the vendor's right of stoppage *in transitu* of a sub-sale or pledge by the vendee is now regulated by the 47th section of the Sale of Goods Act, 1893, which is in the following terms, namely:—

Effect of
sub-sale or
pledge by
buyer.

“Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made unless the seller has assented thereto.

“Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee” (*f*).

(*b*) *Wentworth v. Outhwaite* (1812), 10 M. & W. 436; 12 L. J. Ex. 172; and see *Jones v. Jones* (1811), 8 M. & W. 431; 10 L. J. Ex. 481.

(*c*) *Shubey v. Heyward* (1795), 2 H. Bl. 504; *Crawshay v. Eades* (1823), 1 B. & C. 181; 2 D. & R. 288; *Ex parte Cooper, In re M'Laren* (1879), 11 Ch. D. 68; 48 L. J. Bk. 49. Sect. 45 (7) of the Sale of Goods Act, 1893; and see per Lord Blackburn, in *Kemp v. Falk* (1882), 7 App. Cas. at p. 586; 52 L. J. Ch. 167.

(*d*) Sect. 45 (4) of the Sale of Goods Act, 1893; and see Bolton

v. Lane. & Yorks. Ry. Co. (1866), L. R. 1 C. P. 431; 35 L. J. C. P. 137.

(*e*) *In re Westzinthus* (1833), 5 B. & Ad. 817; 2 N. & M. 644; *Spalding v. Ruding* (1843), 6 Beav. 376; 12 L. J. Ch. 503; but see *Leask v. Scott* (1877), 2 Q. B. D. 376; 46 L. J. Q. B. 329.

(*f*) This section is fully discussed in their “Commentary on the Sale of Goods Act, 1893,” by W. C. A. Ker & Pearson-Gee, pp. 255—263. The other sections of this Act dealing with the subject of stoppage *in transitu*, are dealt with at length in that treatise.

The effect of stoppage *in transitu* is not to rescind the contract, but to give the vendor a lien on the goods (*g*). Effect of stopping.

A recent case on bills of lading, which illustrates the inconvenience of the present system of having so many of them for the same lot of goods, is *Glyn v. East and West India Dock Co.* (*h*), an action for conversion against warehousemen who had, in a perfectly straightforward manner, delivered up some goods on the production of the second bill, contrary to the interests of the plaintiffs, who were indorsees for valuable consideration of the first. The defendants were held not guilty of conversion. Bills of lading.

In *Sewell v. Burdick* (*i*), it was held that the mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass the property in the goods to the indorsee so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. Sewell v. Burdick.

Goods privileged from Distress.



SIMPSON *v.* HARTOPP. (1744)

[84.]

[WILLES, 512.]

John Armstrong was a stocking-weaver of Leicester, and rented a small cottage of the defendant Hartopp. Early in 1741 he hired a stocking-frame from the plaintiff Simpson at a few shillings a week for the purposes of his trade. About the end of the year he got behindhand with his rent, and Hartopp distrained on him. There was not much for the bailiffs when they came; indeed, so little that there was not enough to satisfy the rent in arrear without carrying off Simpson's stocking-frame. This was done, although "the said John Armstrong's apprentice was then weaving a stocking on the said frame."

Simpson afterwards brought an action of trover for the

(*g*) *Clay v. Harrison* (1829), 10 B. & C. 99; 5 M. & R. 17; see sect. 48 of the Sale of Goods Act, 1893.

(*h*) (1882), 7 App. Ca. 591; 52 L. J. Q. B. 146.

(*i*) (1884), 10 App. Ca. 74; 54 L. J. Q. B. 156.

stocking-frame, and succeeded in getting it restored to him; for a landlord has no right to distrain what is *actually in use*.

Landlord
a favoured
creditor.

If a tenant does not pay his rent according to his contract, his landlord has this advantage over other creditors, that, without having to seek the assistance of a Court of law, he may walk straight down to the premises in the tenant's occupation, and carry away sufficient goods to satisfy the debt. This summary and anomalous method of getting one's rights is called—not inappropriately, from the tenant's point of view—*distress*.

All goods
found may
be taken.

The general rule is that all personal chattels found on the demised premises can be distrained for rent. *Simpson v. Hartopp* introduces us to the exceptions to the rule.

Two classes
of things
privileged.

The exceptions may be divided into two classes—

1. Things *absolutely* privileged.
2. Things *conditionally* privileged.

(1.) Abso-
lute
privilege.
Things in
actual use.

1. Some things are *absolutely* privileged from distress; under no circumstances can they be taken. Such things are—

- (1.) *Things in actual use*.

The obvious reason why such things cannot be taken is that to try and do so *would probably lead to a breach of the peace*. Rather a nice point may some day arise as to whether *clothes merely taken off for natural repose* are “in actual use” or not (*k*).

Fixtures.

- (2.) *Fixtures*

cannot be taken, because *damage would be done to the freehold* in tearing them away. A mere temporary removal of fixtures, however, for purposes of necessity will not destroy the privilege (*l*). Nor can keys, charters, &c. be taken (*m*).

Corn and
growing
crops.

At common law, cocks and sheaves of corn and other farm produce, and growing crops could not be distrained; but were absolutely privileged. By an Act of William and Mary (*n*), any person having rent in arrear and due upon any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found, for, or in the nature of, a distress, until the same shall be replevied or sold; but the same must not be removed from such place to the damage of the

(*k*) See *Bissett v. Caldwell* (1791),
Peake, 50; *Baynes v. Smith* (1794),
1 E-p. 206.

T. R. 565.

(*m*) *Hellawell v. Eastwood* (1851),
6 Ex. 295; 20 L. J. Ex. 154.

(*l*) *Gorton v. Falkner* (1792), 4

(*n*) 2 W. & M. sess. 1, c. 5, s. 3.

owner. This Act of William and Mary, however, did not give the landlord a right to distrain growing corn or crops, but an Act with that object was passed in George the Second's reign. 11 Geo. II. c. 19, ss. 8 and 9, authorizes him to seize "*all sorts of corn and grass, hops, roots, fruits, pulse, or other products whatever, which shall be growing*" on any part of the estates demised or holden, "and the same to cut, gather, make, cure, carry, and lay up, *when ripe*, in the barns, or other proper place"—on the premises, if possible; if not, as near thereto as practicable. It is to be observed that this statute of George the Second extends only to crops which become "ripe," and which when ripe are "laid up," and that they must not be taken before they are ripe. In *Clarke v. Gaskarth* (*o*), it was held that young trees, shrubs, and plants growing in a nursery ground could not be distrained as they were not *ejusdem generis* with the "products" specified in the 8th section of the Statute of George. Notice of the place where the distress is lodged is to be given to the tenant within a week of the lodgment.

The grantee of a rent charge cannot take growing crops under 11 Geo. II. c. 19, but he can take hay or straw loose or in the stack (*p*).

(3.) *Goods delivered to a person in the way of his trade* (*q*).

Trade.

The ground of this exemption is public policy, which requires that no unnecessary impediments shall be thrown in the way of trade and commerce. But the goods must be *on the premises* of the person exercising the trade, or they will not be privileged (*r*). Thus, if you entrust a horse to an innkeeper, so long as it remains on the inn premises, the innkeeper's landlord cannot touch it; but if the innkeeper removes it to a friend's stable half a mile off, it is not privileged as against that person's landlord (*s*).

The Agricultural Holdings Act, 1883 (*t*), on the holdings to which that Act applies, gives absolute protection against distress for rent to "agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business, and live stock of all

(*o*) (1818), 8 Taunt. 431; 2 Moore, 491.

(*p*) See *Johnson v. Faulkner* (1842), 2 Q. B. 925; 5 G. & D. 184; *Miller v. Green* (1831), 2 Cr. & J. 143; 8 Bing. 92; and 4 Geo. II. c. 28, s. 5.

(*q*) See the recent case of *Clarke v. Millwall Dock Co.* (1886), 17 Q. B. D. 491; 55 L. J. Q. B. 378, where a ship while building was

held liable to be distrained by the shipbuilder's landlord though belonging to a third person.

(*r*) *Lyons v. Elliott* (1876), 1 Q. B. D. 210; 45 L. J. Q. B. 159; and see *Tapling v. Weston* (1883), 1 C. & E. 99.

(*s*) *Crosier v. Tomkinson* (1759), 2 Ld. Ken. 439.

(*t*) 46 & 47 Vict. c. 61.

kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes."

Perishable
goods.

(4.) *Perishable goods*

cannot (unless by statute) be taken, because they cannot be restored in the same plight, and at common law a distress is a mere pledge. Thus the flesh of animals lately slaughtered cannot be distrained (*u*). Nor can money unless in a bag, so that the same identical coins may be recovered (*x*).

Wild
animals.

(5.) *Animals fere naturæ* :

because no one has any valuable property in them. But *animals fere naturæ* in a state of confinement and civilization (*e.g.*, dogs, deer in a park, birds in cages, &c.) are distrainable (*y*).

Goods in
custody of
law.

(6.) *Goods in the custody of the law.*

Thus, goods which have been distrained damage feasant, or taken in execution, are not distrainable (*z*). But fraudulent and irregular executions will not prevent a distress (*a*), and it has been held that the exemption does not extend to goods in the custody of a messenger under a fiat in bankruptcy (*b*). Moreover, by 14 & 15 Vict. c. 25, s. 2 (which was passed in order to reverse the law as laid down in *Wharton v. Naylor* (*c*)), growing crops seized and sold by the sheriff under an execution are liable, so long as they remain on the land, to be distrained for the rent which becomes due after the seizure and sale, if there is no other sufficient distress. See also 56 Geo. III. c. 50.

Ambassa-
dors.

(7.) *The goods of an ambassador* (*d*).

Lodgers.

(8.) *The goods of a lodger,*

by virtue of an Act (*e*) passed in 1871. The object of this Act was to prevent poor persons from having their homes broken up, and their goods and chattels carried off, because other people did not pay what they owed. The Act does not define a "lodger," and the omission has led to a good deal of litigation (*f*) to which it is not necessary to refer in detail. If the lodger's things have been seized, he must write out a declaration and an inventory, and serve

(*u*) *Morley v. Pincombe* (1848), 2 Ex. 101.

(*x*) 1 Roll. Abr. 667; 2 Bac. Abr. 109.

(*y*) *Davies v. Powell* (1737), Willes, 46; and see *Reg. v. Shickle* (1868), L. R. 1 C. C. R. 158; 38 L. J. M. C. 21.

(*z*) *Peacock v. Purvis* (1820), 2 Bro. & B. 362; 5 Moore, 79.

(*a*) *Blades v. Arundale* (1813), 1 M. & S. 711.

(*b*) *Briggs v. Sowry* (1841), 8

M. & W. 729.

(*c*) (1848), 12 Q. B. 673; 17 L. J. Q. B. 278.

(*d*) 7 Ann. c. 12, s. 3.

(*e*) 34 & 35 Vict. c. 79.

(*f*) See *Morton v. Palmer* (1881), 51 L. J. Q. B. 7; 45 L. T. 426; *Ness v. Stephenson* (1882), 9 Q. B. D. 245; 47 J. P. 134; *Heawood v. Bone* (1884), 13 Q. B. D. 179; 51 L. T. 125; *Phillips v. Henson* (1877), 3 C. P. D. 26; 47 L. J. C. P. 273.

the landlord with the document. If he does that in the proper way, complying faithfully with the requirements of the Act, he will get his things back. See, however, *Thwaites v. Wilding* (g), where Bowen, L.J., said, "I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with. A lodger must make a fresh declaration each time that a distress is levied on his goods. A declaration made at the time of levying one distress will not protect him against a second and subsequent distress. The statute is not for the benefit of the lodger alone; the superior landlord is to enjoy a correlative benefit; he is to receive in part discharge of his claim payment of any rent which may be due from the lodger to his immediate landlord. The declaration required from the lodger must state that the goods seized are his, and whether any and what rent is due from him. The property in the goods seized may vary from time to time, and the state of account between the lodger and his immediate landlord may vary in like manner. . . . When a fresh distress is levied, it must be met by a fresh declaration."

(9.) *Frames, looms, &c., used in the woollen, cotton or silk manufactures* (h). Looms.

(10.) *Gas meters belonging to a gas company incorporated by Act of Parliament* (i). Gas meters.

(11.) *Railway rolling stock in any works not belonging to the tenant of the works* (k). Railway rolling stock.

Reference may here be made to the novel point decided in the recent case of *Tadman v. Henman* (l), where it was held that a person who lets premises to which he has no title, cannot distrain for arrears of rent due from the tenant the goods of a third person which happen to have been brought on to the premises by the tenant's licence; the reason being, that, although a tenant is estopped from disputing his lessor's title, third persons, not claiming possession under the tenant, are not so estopped.

2. Certain other things are privileged *conditionally*. They can be taken, but only when there are not sufficient other goods on the premises to satisfy the landlord's claim. Such things are—

(1.) *Tools of trade*;

Tools.

e. g., a navy's pickaxe, a doctor's stethoscope, a stocking-weaver's

(g) (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; but see *Ex parte Harris* (1885), 16 Q. B. D. 130; 55 L. J. M. C. 24; where it was held that, if no rent was due from a lodger, the declaration need not state the fact, nor need it state that the declarant was a lodger.

(h) 6 & 7 Vict. c. 40, ss. 18 and 19.

(i) Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 14.

(k) 35 & 36 Vict. c. 50, s. 3.

(l) [1893] 2 Q. B. 168; 57 J. P. 661.

frame, or a lawyer's "Leading Cases." It would be contrary to public policy to take the means whereby a man lives (*m*). (Of course, if the lawyer were actually reading his law-book, or the doctor using his surgical instrument, such things would be *absolutely* privileged as being *in actual use*.)

Ledgers, day-books, vouchers, and other business papers are not distrainable (*n*).

Beasts.

(2.) *Beasts of the plough and sheep* (*o*).

But colts, steers, and heifers are not privileged (*p*); and beasts of the plough may be distrained if the only other subject of distress is growing crops (*q*). Moreover, beasts of the plough can be distrained *for poor-rates*, whether there are other things on the premises or not (*r*).

Agricultural Holdings Act, 1883.

The 45th section of the Agricultural Holdings Act, 1883 (*s*), protects the live stock of a third person brought on to a holding to which the Act applies to be fed at a fair price, provided that there is other sufficient distress which can be taken. The "fair price" need not be in money. In the *London and Yorkshire Bank v. Belton* (*t*) cows were agisted on the terms "milk for meat,"—*i. e.*, that the agister should take their milk in exchange for their pasturage—and it was held that the agistment was within the Act. "The question is," said Lord Coleridge, C. J., "what is the meaning of the words 'fair price.' Putting aside pedantic and scholastic refinements and derivations, 'price' in ordinary colloquial language does not always mean money, and 'fair price' does not always mean 'coin of the realm.' We say that a man got something and paid a fair price for it without meaning that he paid so many pounds, shillings and pence, but meaning only that he paid a fair equivalent, for what he got." "I cannot gather from the section," said Mathew, J., "the slightest hint of an intention in the legislature to confine the provision to cases where contracts of agistment shall be for money and money only."

"Milk for meat."

Trespass *ab initio*.

The effect of taking privileged goods is to make the distraining landlord a trespasser *ab initio*. But where *part only* of the goods distrained are privileged, he is a trespasser *ab initio* in respect of that part only (*u*). Double the value of goods distrained and sold

(*m*) *Gorton v. Falkner* (1792), 4 T. R. 565.

(*n*) *Woodf. Landl. & Ten.* 14th ed. p. 470.

(*o*) See 51 Hen. III. stat. 4.

(*p*) *Keen v. Priest* (1859), 4 H. & N. 236; 23 L. J. Ex. 157.

(*q*) *Piggott v. Birtles* (1836), 1 M. & W. 441; 2 Gale, 18.

(*r*) *Hutchins v. Chambers* (1758),

1 Burr. 579; 2 Ld. Ken. 204.

(*s*) 46 & 47 Vict. c. 61. It should be noted that sects. 49—52 of this Act were repealed by the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, s. 8).

(*t*) (1885), 15 Q. B. D. 457; 54 L. J. Q. B. 568.

(*u*) *Harvey v. Pocock* (1843), 11 M. & W. 740; 12 L. J. Ex. 434.

where no rent is due may be recovered by the owner of the goods. (2 W. & M. c. 5, s. 4.)

Generally, a distress cannot be levied elsewhere than on the tenant's premises (*x*). But if, while his rent is in arrear, he "fraudulently or clandestinely" (*y*) removes his goods, to prevent a distress, his landlord may, within thirty days after such removal, follow and take them from the place to which they have been removed (*z*). If, however, before getting at them, the goods have been sold to a *bonâ fide* purchaser for valuable consideration, he will be too late (*a*). In *Gray v. Stait* (*b*), it was held that a landlord could not follow and distrain his tenant's goods which had been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises had come to an end and he was no longer in possession. "The statute 11 Geo. 2, c. 19, s. 1," said Bowen, L. J., "allows a distress upon goods fraudulently removed, only where a distress could have been lawfully made if they had remained upon the demised premises. The argument for the defendants is not assisted by the provisions of 8 Anne, c. 14, ss. 6, 7 (*c*); these enactments merely provide that the goods of the tenant may be distrained after the expiration of the tenancy whilst he remains in possession."

Fraudulent removal of goods.

The Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), provides that no person shall act as bailiff to levy any distress for rent, unless authorised to act as a bailiff by a certificate of a county court judge, and any person not holding such a certificate who levies a distress is deemed to be a trespasser (*d*). The goods distrained cannot be sold until the expiration of fifteen days from their seizure, provided the tenant so require in writing, and give security for any additional costs thereby incurred.

Distress Amendment Act, 1888.

The costs of distress are regulated and restricted by the Distress for Rent Rules, 1888.

(*x*) *Buszard v. Capel* (1828), 8 B. & C. 141; 6 Bing. 150; but see *Gillingham v. Gwyer* (1867), 16 L. T. 640.

(*y*) The word connecting these adverbs being "or," not "and," it has been held that a landlord is justified under the statute in following goods removed without the slightest attempt at concealment. *Opperman v. Smith* (1824), 4 Dowl. & R. 33.

(*z*) 11 Geo. 2, c. 19.

(*a*) Sect. 2. But under sect. 3, the landlord may recover double

the value of the goods. See the recent cases of *Tomlinson v. Consolidated, &c. Corporation* (1890), 24 Q. B. D. 135; 62 L. T. 162; *Hobbs v. Hudson* (1890), 25 Q. B. D. 232; 59 L. J. Q. B. 562.

(*b*) (1883), 11 Q. B. D. 668; 52 L. J. Q. B. 412.

(*c*) As to the effect of this Act, see *Wilkinson v. Peel*, [1895] 1 Q. B. 516; 64 L. J. Q. B. 178.

(*d*) See *Hogarth v. Jennings*, [1892] 1 Q. B. 907; 61 L. J. Q. B. 601.

County
Courts
Act, 1888,
sect. 160.

Reference should also be made to section 160 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which provides that when goods in a tenement for which rent is due are taken in execution under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice in writing signed by himself or his agent, stating the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due, to the bailiff making the levy, and such bailiff shall, in making the levy, in addition thereto distrain for the rent so claimed (*e*). Such claim, however, must be made within five clear days from the date of such taking, or before the removal of the goods, and is only available for four weeks' rent where the tenement is let by the week, or for two terms of payment where the letting is for any other term less than a year, or one year's rent in any other case.

Agricultural Fixtures, &c.

[85.]

ELWES *v.* MAW. (1802)

[3 EAST, 38.]

The question in this case was whether the tenant of a farm in Lincolnshire was entitled, at the expiration of his lease, to demolish and cart away a beast house, a carpenter's house, a pigeon house, and other fixtures he had put up. It was held that he could not do this, and that they became the landlord's.

The Agricultural Holdings Act of 1883 (*f*) has considerably extended the rights of agricultural tenants to remove fixtures. The 34th section of that Act is as follows:—

“Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fix-

(*e*) See *Hughes v. Smallwood* Q. B. 503.
(1890), 25 Q. B. D. 206; 59 L. J.

(*f*) 43 & 44 Vict. c. 61.

ture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

“ Provided as follows:—

“(1.) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding.

“(2.) In the removal of any fixture or building, the tenant shall not do any avoidable damage to any other building or other part of the holding.

“(3.) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal.

“(4.) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.

“(5.) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).”

Fixtures erected for purposes of *trade, ornament, or domestic use* may, as a rule, be freely removed by the tenant. But in *Buckland v. Butterfield* (g) (which may be considered the leading case on ornamental and domestic fixtures) it was held that a tenant was not entitled to remove a conservatory. As Dallas, C. J., said in that case, the right of the tenant to remove an ornamental fixture “must depend on the particular case.” As to shrubs, box borders, &c., an ordinary tenant cannot remove such things, but a nurseryman may (h).

Trade, ornamental, or domestic fixtures may generally be removed. *Buckland v. Butterfield*.

On the whole, then, as between landlord and tenant, the maxim “*quicquid plantatur solo, solo cedit*” has lost much of its pristine force and application. But the tenant must take care to remove his fixtures *during the tenancy* (i), even though the lease determines by forfeiture and not by effluxion of time (k); otherwise, the law

Fixtures must be removed during tenancy.

(g) (1820), 2 Bro. & Bing. 54; 4 Moore, 440. 88; 4 Esp. 33.

(h) *Empson v. Soden* (1833), 4 B. & Ad. 655; 1 N. & M. 720; *Penton v. Robart* (1801), 2 East, 88; 4 Esp. 33.

(i) *Lyde v. Russell* (1830), 1 B. & Ad. 391.

(k) *Pugh v. Arton* (1869), L. R. 8 Eq. 626; 38 L. J. Ch. 619.

will presume that he intended to make a present of them to his landlord.

Heir and
executor.

As between heir and executor, however, the law is more as it used to be; for the house or land cannot be ruthlessly stripped of fixtures which add materially to its enjoyment. But exceptions to the rule are said to exist in the case of trade fixtures (*l*), and generally of those fixtures put up for ornament or convenience which can be removed without disfiguring the house (*m*).

Vendor
and
vendee.

As between vendor and vendee, a sale of the freehold carries with it the fixtures, unless there is an express provision to the contrary (*n*).

Outgoing
and
incoming
tenant.

As between outgoing and incoming tenant, there is generally an agreement by the latter (which need not be in writing) (*o*) to take the fixtures at a valuation. To this agreement it is desirable that the landlord should be a party; otherwise he might say that the outgoing tenant had forfeited them to him by not removing them, and so the incoming tenant would not be able to remove them at the end of his term.

As to the tenant's rights to remove fixtures where the demised premises are mortgaged, see *ante*, page 74.

What is a
fixture.

The following definition of a fixture had the approval of the Queen's Bench in a case (*p*) where the question was whether certain colliery railways were exempt from distress as being fixtures:—

“It is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought into contact with it; the definition requires *something more than mere juxtaposition*, as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened to some fabric previously attached to the ground.”

Construc-
tive annex-
ation.

It may be remarked, however, that there can be a “constructive annexation.” Keys, heirlooms, charters, deeds, fish, &c., are considered for most purposes to be annexed to the freehold.

By way of further illustration of this subject, reference may be made to the case of *Wake v. Hall* (*q*), where the right of a miner

(*l*) See *Lawton v. Lawton* (1743), 3 Atk. 14; *Trappes v. Harter* (1833), 2 C. & M. 153; 3 Tyr. 604.

(*m*) *Beck v. Rebow* (1706), 1 P. Wms. 94; but see *Cave v. Cave* (1705), 2 Vern. 508.

(*n*) *Colegrave v. Dios Santos* (1823), 2 B. & C. 76; 3 D. & R. 255.

(*o*) *Hallen v. Runder* (1834), 1 C. M. & R. 266; 3 Tyr. 959; *Lee v. Gaskell* (1876), 1 Q. B. D. 700; 45 L. J. Q. B. 540.

(*p*) *Turner v. Cameron* (1870), L. R. 5 Q. B. 306; 39 L. J. Q. B. 125.

(*q*) (1883), 8 App. Ca. 195; 52 L. J. Q. B. 494.

under the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94), as against the surface owner, to remove buildings erected for mining purposes, was discussed, and the maxim "*quicquid plantatur, &c.*," was held inapplicable.

Gifts.

IRONS *v.* SMALLPIECE. (1819)

[86.]

[2 B. & ALD. 551.]

Twelve months before his death, and while he believed himself to be still in the prime of life, Mr. Irons, by word of mouth, made his son a present of a pair of horses. The horses, however, were not delivered over by the donor to the donee, but remained in the father's possession until his death; and this was an action by the son, after the old gentleman's death, to obtain possession of them. In this attempt, however, he failed, on the ground that "by the law of England, *there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.*" *I.e.*, under seal.

The necessity of delivery in order to constitute a valid gift of a chattel has been affirmed by the Court of Appeal in the recent case of *Cochrane v. Moore* (*r*). The whole of the authorities on the subject, from Bracton to the present time, are fully considered in the learned and exhaustive judgment delivered by Fry, L. J.; the result being to affirm the decision in *Irons v. Smallpiece*. Reference may usefully be made to an article on this subject by Sir F. Pollock, in the "Law Quarterly Review" (1890), p. 446.

The necessity for delivery is not dispensed with though the chattel is already in the possession of the donee (*s*). But the delivery spoken of is a delivery of possession, and does not necessarily mean an actual manual handling of the articles given. If, therefore, the Importance of delivery.

(*r*) (1890), 25 Q. B. D. 57; 59 L. J. Q. B. 377.

(*s*) *Shower v. Pilch* (1849), 4 Ex. 478.

possession is changed in consequence of a verbal gift—as where the possession has been held in one capacity up to the time of the gift, and from that time it is held in another capacity—the gift is completed (t).

Declara-
tion of
trust.

Giving
cheques to
babies.

But, even where there is neither deed nor delivery, if the donor declares that he retains possession *in trust* for the donee, equity will enforce the trust. But the declaration must be pretty clear. A father once put a cheque for 900*l.* into the hand of his son of nine months old, saying, “*Look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it.*” “Don’t let him tear it,” remarked the mother. “Never mind if he does,” sharply replied her lord, “*it is his own, and he may do what he likes with it.* Now Lizzie,”—this to the nurse—“I am going to put this away for my own son.” Then the fond parent took the cheque away from the unappreciative infant, and locked it away in an iron safe. A week afterwards, meeting his solicitor, he said, “I shall come to your office on Monday to alter my will, that I may take care of my son.” The same day—such is life!—he died, and the cheque was found amongst his effects. It was held that, though a parol declaration of trust in favour of a volunteer may be valid, there had under the circumstances been no gift to, or valid declaration of trust for, the son (u). “It was all quite natural,” remarked Lord Cranworth, L. C., “but the testator would have been very much surprised if he had been told that he had parted with the 900*l.*, and could no longer dispose of it. It all turns upon the facts, which do not lead me to the conclusion that the testator meant to deprive himself of all property in the note, or to declare himself a trustee of the money for the child.”

Gift to
person in
fiduciary
relation
presumed
to have
been proc-
ured by
undue
influence.

When a fiduciary or confidential relation exists between the donor and the donee, there is presumption that undue influence has been exercised by the donee, and the onus lies on him of showing that the transaction is one that can be supported. Thus, a donation from a child to a parent (x), or from a ward to a guardian (y), or from a beneficiary to an executor (z), is looked upon

(t) *Kilpin v. Ratley*, [1892] 1 Q. B. 582; 66 L. T. 797; and see *Winter v. Winter* (1861), 4 L. T. 639; and *Alderson v. Peel* (1891), 7 Times L. R. 418.

(u) *Jones v. Lock* (1865), L. R. 1 Ch. 25; 35 L. J. Ch. 117; and see *Ellison v. Ellison* (1802), 6 Ves. 656; *Ex parte Pye* (1811), 18 Ves. 140; *Donaldson v. Donaldson* (1854), Kay, 711.

(x) See *Wright v. Vanderplank* (1855), 2 K. & J. 1; 25 L. J. Ch. 753; *Cocking v. Pratt* (1750), 1 Ves. 401; *Blackborn v. Edgeley* (1719), 1 P. Wms. 600; and *Firmin v. Pulham* (1848), 2 De G. & Sm. 99.

(y) See *Hylton v. Hylton* (1754), 2 Ves. 549; *Hatch v. Hatch* (1804), 9 Ves. 292.

(z) *Wheeler v. Sargeant* (1893), 69 L. T. 181; 3 R. 663.

with great suspicion. So, as the leading case (*a*) on the subject shows us, silly women require to be protected against designing clergymen. "Perhaps no general rule can well be laid down as to what amounts to undue influence: that will be a question for the judge to decide upon the circumstances of each particular case, and such circumstances as the *non-intervention of a disinterested person*, or professional adviser, on the behalf of the donor,—especially if the donor is, from age or weakness of disposition, likely to be imposed upon—the *statement of a consideration where there was actually none*, the *absence of a power of revocation*, the *improvidence of the transaction*, furnish a probable, though not always a certain, test of undue influence or fraud" (*b*).

The two recent cases of *Mitchell v. Homfray* (*c*), and *Taylor v. Johnston* (*d*), may be mentioned here.

The action in the former case was by the executors of a Mrs. Geldard to recover a sum of 800*l.* from the defendant, who had acted as her medical attendant. The 800*l.* had been given by Mrs. Geldard to the defendant while she was his patient, and without her having any independent advice; but the doctor had not been guilty of any undue influence; and, after the relation of physician and patient had ceased, Mrs. Geldard elected to abide by the gift, and did, in fact, abide by it during the remaining three or four years of her life. Under these circumstances it was held that the gift could not be impeached after Mrs. Geldard's death, notwithstanding that it was not proved that the donor was aware that the gift was voidable at her election. "In *Rhodes v. Bate*" (*e*), said Lord Selborne, L. C., "it was laid down in clear terms that, in order to uphold a gift made to a person standing in a confidential relation, the donor must have had competent and independent advice in conferring it. This is undoubtedly the rule *so long as the confidential relation exists*; but it is not laid down in *Rhodes v. Bate* that advice of that kind is necessary *when the confidential relation has come to an end, and the donor is no longer subject to its influence*." "If the transaction," said Baggallay, L. J., "was not formally ratified, it was at all events *adopted*; and, for three years before her death, the testatrix kept to her determination not to impeach it."

The
doctor's
best
customer.

(*a*) *Huguenin v. Baseley* (1807), 14 Ves. 273.

(*b*) 2 Wh. & T. Eq. L. C. 581; and see the recent case of *Morley v. Loughnan*, [1893] 1 Ch. 736; 62 L. J. Ch. 515.

(*c*) (1881), 8 Q. B. D. 587; 50

L. J. Q. B. 460.

(*d*) (1882), 19 Ch. Div. 603; 51 L. J. Ch. 879; and see *In re Parker*, *Barker v. Barker* (1880), 16 Ch. D. 41.

(*e*) (1866), L. R. 1 Ch. 252; 35 L. J. Ch. 267.

A strong-minded young lady.

In *Taylor v. Johnston* (*f*), the action was by personal representatives for much the same purpose as in the case last referred to, and it was held that, in the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the relation of guardian and ward between the donee and the donor, *a gift of her property within a month before her death by an infant of twenty of business habits, firm will, and fully capable of managing her own affairs to a relative with whom she had been living from the time of her father's death five months before, is not invalid.* "She was at this time," said the court, "in a moribund state, as nobody can doubt. The doctor who spoke to the state of her health speaks of it as *wasting*, of her death as *certain*, but of her mind as *perfectly clear*, her actions *wholly uncontrolled*. Under these circumstances it is that she made the donation in question. Now, in my opinion, it is perfectly lawful, under such circumstances, for an infant to make a donation. If the relationship of guardian and ward had subsisted,—," that would have been a very different thing.

Morley v. Loughnan.

When a gift is void as having been obtained by undue influence, the property can be recovered not only from the donee but also from other persons who may have innocently received it from the donee (*g*).

Donationes mortis causâ.
Attitude of donor.

A *donatio mortis causâ* is a conditional gift of personalty made in contemplation of death. The donor would prefer (*h*) that he himself should remain the owner of the thing he gives, rather than that it should have a new owner, whether the donee or anybody else; but he is very ill and expects to die, and, knowing that he cannot carry his property away with him, he hands it over to the donee, to be his in the anticipated event of death. But the gift will be defeated not only by the donor's *getting better* (*i*), but also by his *revoking* (*k*) it. And even though the donor does not expressly say that he will want the thing back, if by any accident he recovers, the law will *imply a condition* to that effect (*l*). There must be an actual delivery of the thing to the donee, or to some one else for the donee's use (*m*), and the donor must part, not only with the possession, but the dominion (*n*); though the gift may be saddled with a

Recovery or revocation.

Actual delivery necessary.

(*f*) *Supra*.

(*g*) See *Morley v. Loughnan*, [1893] 1 Ch. 736; 62 L. J. Ch. 515.

(*h*) Et, in summâ, *mortis causâ donatio est cum magis se quis velit habere quam cum cui donatur, magisque cum cui donat quam heredem suum.* Just. Inst., Lib. 2, Tit. 7.

(*i*) *Staniland v. Willott* (1852), 3

Mae. & G. 664.

(*k*) See *Edwards v. Jones* (1836), 1 My. & Cr. 226; *Tate v. Hilbert* (1793), 2 Ves. jun. 111.

(*l*) *Gardner v. Parker* (1818), 3 Madd. 184.

(*m*) *Drury v. Smith* (1717), 1 P. Wms. 404.

(*n*) *Hawkins v. Blewitt* (1798), 2 Esp. 663.

trust (*o*). A mere delivery to an agent as agent *for the donor* will not do (*p*). It is not sufficient to deliver a symbol; but where the nature of the thing will not admit of a corporeal delivery, a delivery of the *means of coming at the possession* (e. g., a key) will be effective (*q*). In the leading case (*r*) on *donationes mortis causâ* it was held that the delivery of receipts for South Sea annuities was not enough to pass the stock, notwithstanding that there was strong evidence of the intent to make a gift of such annuities. Mere symbol will not do, but key will. Receipts for South Sea annuities.

A *donatio mortis causâ* probably cannot be made by deed without delivery (*s*). Deed without delivery.

There may be a *donatio mortis causâ* of bonds (*t*), bank-notes (*u*), mortgage-deeds (*x*), policies of insurance (*y*), or promissory notes payable to order though not indorsed (*z*); but not of cheques (*a*), or railway stock (*b*). An old farmer, some years ago, being in his last illness, gave his nephew, who had for some years lived with him and helped him in his business, a cheque for 4,000*l.*, and with it his banker's pass book. Then the old man died, having provided properly, as he thought, for his nephew. But when, after his uncle's death, the young man went to the bankers, they refused to cash the cheque; and when he came afterwards to Lincoln's Inn, he found that neither could the transaction be supported as a valid *donatio mortis causâ* (*c*). Documents.

A *donatio mortis causâ* differs from a legacy in the two points that neither probate (*d*) nor the executor's assent (*e*) are necessary. It differs from a gift *inter vivos* (such as *Irons v. Smallpiece*) has to How *donatio mortis causâ* differs from

(*o*) *Blount v. Burrow* (1792), 4 Bro. C. C. 72; *Hills v. Hills* (1841), 8 M. & W. 401; 5 Jur. 1185; *In re Richards* (1887), 36 Ch. D. 541; 56 L. J. Ch. 923.

(*p*) *Farquharson v. Cave* (1846), 2 Coll. 356.

(*q*) *Jones v. Selby* (1710), Prec. Chanc. 300; *Smith v. Smith* (1735), 2 Stra. 955; *Bunn v. Markham* (1816), 7 Taunt. 224; Holt. 352.

(*r*) *Ward v. Turner* (1752), 2 Ves. 431. See also *In re Hughes* (1888), 59 L. T. 586; 36 W. R. 821.

(*s*) See Wms. Exors. (8th ed.), p. 786.

(*t*) *Snelgrove v. Bailey* (1744), 3 Atk. 214; *In re Taylor* (1887), 56 L. J. Ch. 597.

(*u*) *Miller v. Miller* (1735), 3 P. Wms. 356.

(*x*) *Duffield v. Hicks* (1827), 1 Bligh, N. S. 497; 1 D. & C. 1.

(*y*) *Witt v. Amiss* (1861), 1 B. & S. 109; 30 L. J. Q. B. 318.

(*z*) *Veal v. Veal* (1859), 27 Beav. 303; 29 L. J. Ch. 321; *In re Mead* (1880), 15 Ch. D. 651; 50 L. J. Ch. 30; *In re Whitaker* (1889), 42 Ch. D. 119; 58 L. J. Ch. 487; *In re Dillon* (1890), 44 Ch. D. 76; 59 L. J. Ch. 420.

(*a*) *Hewitt v. Kaye* (1868), L. R. 6 Eq. 198; 37 L. J. Ch. 633.

(*b*) *Moore v. Moore* (1874), L. R. 18 Eq. 474; 43 L. J. Ch. 617.

(*c*) *Beak v. Beak* (1872), L. R. 13 Eq. 489; 41 L. J. Ch. 470.

(*d*) *Thompson v. Hodgson* (1727), 2 Stra. 777; *Rigden v. Vallier* (1751), 2 Ves. sen. 252.

(*e*) *Tate v. Hilbert* (1785), 2 Ves. jun. 111.

legacy and
from gift
inter vivos.

Unsuc-
cessful
efforts.

Gift to
husband
and wife.

Married
Women's
Property
Act, 1882.

*Donatio
mortis
causâ.*

Inter vivos.

do with) in the three points that (1) it is revocable, (2) it is liable to legacy duty (*f*), and (3) to debts (*g*).

An attempt to make an irrevocable gift *inter vivos* cannot be supported as a *donatio mortis causâ* (*h*); nor can an invalid testamentary gift be vivified in this way (*i*).

The old and familiar rule of law that husband and wife are for most purposes considered as but one person, so that under a gift by will to a husband and wife and a third person, the husband and wife take one moiety between them, the third person taking the other moiety, is still applicable, and has not been displaced by the Married Women's Property Act, 1882 (*k*).

In *Standing v. Bowring* (*l*), the plaintiff, a widow, in the year 1880, caused a sum of £6,000 Consols to be transferred into the joint names of herself and the defendant, who was her godson, and in whose welfare she took great interest. This transfer was not made known to the defendant. In 1882, the plaintiff, then eighty-eight years old, married a second husband, and soon afterwards applied to the defendant to re-transfer the stock into her name alone. It was decided that the transfer was originally made with the deliberate intention of benefiting the defendant, and not with a view to the creation of a trust. The Court would not, therefore, compel the defendant to re-transfer the stock.

A cheque payable to the donor or order, and without having been endorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order, and following *Veal v. Veal* (27 Beav. 303), will pass to the son by way of *donatio mortis causâ* (*m*). A clear intention on the part of the donor to give, acted upon by the donee, does not probably constitute a valid gift *inter vivos*, without actual delivery (*n*). In 1866, A., soon after the birth of his son, T., purchased a pipe of wine for his son, and had it bottled and laid down in his cellar, and from that time it remained

(*f*) 36 Geo. 3, c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

(*g*) *Smith v. Drury* (1717), 1 P. Wms. 404.

(*h*) *Edwards v. Jones* (1836), 1 My. & Cr. 226.

(*i*) *Mitchell v. Smith* (1864), 12 W. R. 941; 4 De G. J. & S. 422.

(*k*) *In re March*, *Mander v. Harris* (1884), 27 Ch. D. 166; 54 L. J. Ch. 143; *In re Jupp*, *Jupp v. Buckwell* (1888), 39 Ch. D. 148; 57 L. J. Ch. 774; *Butler v. Butler* (1885), 14 Q. B. D. 831; per Wills, J.,

affirmed by C. A., 16 Q. B. D. 374; 54 L. T. 591.

(*l*) (1885), 31 Ch. D. 282; 55 L. J. Ch. 218.

(*m*) *Clement v. Cheeseman* (1884), 27 Ch. D. 631; 33 W. R. 40; and see *In re Shier*, *Pechy Ridge v. Burrow* (1885), 53 L. T. 5.

(*n*) See *Cochrane v. Moore*, *supra*, dissenting from *In re Harcourt*, *Danby v. Tucker* (1883), 31 W. R. 578; dictum of Parke, B., in *Ward v. Audland* (1847), 16 M. & W. 862.

intact in the cellar, and was known in the family and amongst their friends as T.'s wine. In 1885, A. became bankrupt. It was decided that there was not sufficient evidence of an intention to make an immediate present gift of the wine to T., and that it passed to the trustee in bankruptcy (*o*).

As to gifts defrauding creditors, see *post*, p. 286.

Bills of Sale, &c.

TWYNE'S CASE. (1885)

[87.]

[3 REP. 80.]

A Hampshire farmer named Pierce got deeply into debt, and amongst his creditors were two persons named Twyne and Grasper. To the former he owed 400*l.*, and to the latter 200*l.* After repeatedly dunning the farmer in vain, Grasper decided to go to law for his money, and had a writ issued. As soon as Pierce heard of this, he took the other creditor, Twyne, into his confidence, and in satisfaction of the debt of 400*l.* made a secret conveyance to him of everything he had. In spite of this deed, however,—in pursuance of the nefarious arrangement between them,—Pierce continued in possession just as if he had never made it. He sold some of the goods, sheared and marked some of the sheep, and in every way acted as if he were the absolute owner, and Twyne had nothing to do with it. Meanwhile Grasper went on with his action, got judgment, and consequently the assistance of the sheriff of Southampton, who appeared one day at the homestead, with the intention of carrying off, in Mr. Grasper's inte-

(*o*) *In re Ridgway* (1885), 15 Q. B. D. 417; 51 L. J. Q. B. 570. But see *Cochrane v. Moore*, *supra*.

rest, whatever he might chance to find there. This proceeding Twyne, who suddenly appeared on the scene, strongly objected to, for, said he,—“Everything on this farm belongs to *me*, not to Pierce,”—and, in proof of his assertion, he produced the deed of conveyance.

The question was whether this deed of conveyance was void within the meaning of an Act of Parliament passed in Queen Elizabeth’s reign, which provides that all gifts made for the purpose of cheating creditors shall be void. And, for the following reasons, this gift of Pierce’s was considered to be just the kind of gift contemplated by the statute:—

(1.) It was impossible that anybody could really be so generous as Mr. Pierce had proposed to be. He had given away everything he had in the world, even down to the boots he was wearing. Such self-denial could only be the cloak of fraud.

(2.) In spite of his parade of liberality, Mr. Pierce did not let one of his things go, but used them all just as if they were his own, thereby obtaining a factitious credit in the world.

(3.) Then, if there was no fraud, why was there so much mystery about it? Why was not the gift made openly?

(4.) The gift was made, too, when Grasper had already commenced an action, and evidently meant business.

(5.) There was a trust between the parties, and trust was only another name for fraud.

(6.) The deed alleged that the gift was made “honestly, truly, and *bonâ fide*,” and that was a very suspicious circumstance in itself.

Gifts de-
frauding
creditors.

It is declared by 13 Eliz. c. 5, that all gifts and conveyances, whether of lands or chattels, made for the purpose of delaying or defrauding creditors, shall be null and void as against such creditors. There is, however, a proviso excepting from the operation of this enactment gifts and conveyances made upon valuable consid-

ration and *bonâ fide* to persons having no notice of the fraud. Now, it is clear that Farmer Pierce's gift was for valuable consideration. Why, then, did it not fall within the proviso? The answer obviously is, because it was not *bonâ fide*. It was merely the creation of a trust for the benefit of Pierce himself.

In order that a mere voluntary settlement may be void within the statute, it is not necessary to prove that an actual intention to delay or defraud his creditors was present to the mind of the settlor at the time when the deed was executed. It is sufficient to set aside such a gift as fraudulent if the *necessary consequence of it* is so to delay or defraud the creditors (*p*). In such case the fraudulent intention will be presumed to exist. Thus, a man who contemplates entering upon a hazardous business cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations by settling it upon his wife and children (*q*). Sect. 5 of 13 Eliz. c. 5, however, protects a purchaser for value of any interest, legal or equitable, derived under a settlement which is fraudulent and void under the statute as against creditors, provided such purchaser had no notice of its fraudulent nature (*r*). It may, too, be noticed that provision is made by the Bankruptcy Act, 1883, s. 47, for the avoidance, in most cases, of voluntary settlements made by a trader within two years of his bankruptcy, or, indeed, within ten years, "unless the parties claiming under such settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement" (*s*).

Fraud
sometimes
presumed.

It is extremely important that it should be understood that a deed is not necessarily void because it amounts to an assignment of *all* the grantor's property for the benefit of a particular creditor or of particular creditors. There is nothing at common law to prevent a debtor preferring one creditor to another, and the Statute of Elizabeth does not touch the question of equal distribution of assets. "If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the

Fraudulent
preference.

(*p*) *Freeman v. Pope* (1870), L. R. 5 Ch. 538; 39 L. J. Ch. 689.

(*q*) *Mackay v. Douglas* (1872), L. R. 14 Eq. 106; 41 L. J. Ch. 539; *Ex parte Russell, In re Butterworth* (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; *In re Troughton* (1891), 71 L. T. 427. But see *In re Cranston* (1892), 9 M. B. R. 100.

(*r*) *Halifax Banking Co. v. Gledhill*, [1891] 1 Ch. 31; 60 L. J. Ch. 181.

(*s*) See *In re Vansittart* (No. 1), [1893] 1 Q. B. 181; 62 L. J. Q. B. 277; (No. 2), [1893] 2 Q. B. 377; 62 L. J. Q. B. 279; *In re Brall*, [1893] 2 Q. B. 381; 62 L. J. Q. B. 457; *In re Naylor* (1893), 63 L. J. Q. B. 460; 69 L. T. 355.

Statute of Elizabeth" (*t*). Such a deed may, it is true, operate as an act of bankruptcy, or it may be void as amounting to a fraudulent preference within the meaning of the bankruptcy laws (*u*); but, if the time be past within which the execution of the deed is an act of bankruptcy available for adjudication against the grantor, or within which the deed can be set aside as a fraudulent preference, it cannot be treated as void within the policy of the bankruptcy laws (*x*).

Boldero's
case.

It has been recently decided that a deed, by which insolvent debtors conveyed all their estate to trustees on trust for sale and division of the proceeds amongst the creditors parties to the deed, was not void under the Statute of Elizabeth, although it contained a clause leaving it in the discretion of the trustees not to pay any dividend to creditors who had neglected or refused to execute the deed (*y*). The Court distinguished the case from the somewhat similar one of *Spencer v. Slater* (*z*), where the deed was held to be void, on the ground that in the latter case the primary object was to carry on, not to sell, the business; and there was, moreover, in *Spencer v. Slater* a peculiar resulting trust under which, at the expiration of twelve months, the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then, if the creditors did not within seven days assent or execute, the money was to be paid to the debtor.

Spencer v.
Slater.

Bills of
sale.

The present subject derives great interest and importance from its connection with bills of sale, which are regulated by special and elaborate statutory provisions (*u*). It is sufficient here to say that a bill of sale is an instrument by which one man purports to grant to another his interest in the goods and chattels specified in such instrument. Prior to the legislation of modern times, the continuance in possession by the grantor was viewed as a badge of fraud, and hence as a circumstance serving to avoid the transaction under the Statute of Elizabeth. Now, it was clearly beneficial that the owner of personal property should be able to make such a transfer without any actual change of possession, and yet, that publicity should be given to the transaction. This result was

(*t*) Per Giffard, L. J., *Alton v. Harrison* (1869), L. R. 4 Ch. at p. 626; 38 L. J. Ch. 669.

(*u*) See 46 & 47 Vict. c. 52.

(*x*) *Ex parte Gurnes, In re Bamford* (1879), 12 Ch. D. 314.

(*y*) *Boldero v. London and Westminster Loan Co.* (1879), 5 Ex. D. 47; 42 L. T. 56.

(*z*) (1878), 4 Q. B. D. 13; 48 L. J. Q. B. 204; and see *Golden v. Gillam* (1882), 51 L. J. Ch. 154, 503; 46 L. T. 222; *In re Ridler* (1883), 22 Ch. D. 74; 52 L. J. Ch. 343.

(*u*) 17 & 18 Vict. c. 36; 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

accomplished by enacting that a bill of sale, if duly made and duly registered in the manner prescribed, should be valid whether the grantor continued in possession or not, and that even as against his trustee in bankruptcy. Under the Act of 1878, the registration is to take place within seven days, instead of twenty-one, as formerly; the consideration is to be set forth in the bill of sale, and the necessity of attestation is introduced. The Act of 1882 (*b*), which is to be construed together with the 1878 Act, renders entirely void every bill of sale given in consideration of any sum under 30*l.*, or which is not duly attested and registered, or which does not truly set forth the consideration for which it was given. The Act also supplies a form in accordance with which the bill of sale must be drawn, and provides that it shall have attached a schedule containing an inventory of the property comprised therein. For further information reference should be made to the statutes and treatises bearing on the subject.

It may, perhaps, be convenient here to mention the existence of 27 Eliz. c. 4. That statute, which is confined exclusively to *real property*, is in favour of purchasers, and makes void, as against subsequent purchasers of the same land, all gifts and conveyances made with the intention of defeating them, or containing a power of revocation. And it was settled by numerous decisions (*c*) that every *voluntary* conveyance was, by the statute, made void as against a subsequent *bonâ fide* purchaser for value (*d*). This, however, has recently been altered by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which provides that voluntary conveyances, if in fact made *bonâ fide* and without any fraudulent intent, are not to be avoided under 27 Eliz. c. 4. This does not apply to transactions completed before the passing of the Act.

Voluntary gifts *for charitable purposes* have recently been held (*e*) not to come within the meaning of 27 Eliz. c. 4, and so are not avoided by a subsequent conveyance for value.

(*b*) 45 & 46 Vict. c. 43.

(*c*) *Doe v. Manning* (1807), 9 East, 59.

(*d*) As to who are volunteers within the meaning of this Act, reference may be made to the

recent case of *De Mestre v. West*, [1891] A. C. 264; 60 L. J. P. C. 66.

(*e*) *Ramsay v. Gilchrist*, [1892] A. C. 412; 61 L. J. P. C. 72. And see 43 Eliz. c. 4.

Act of
1882.

27 Eliz.
c. 4.

Voluntary
Convey-
ances Act,
1893.

Waiver of Forfeiture, &c.

[88.]

DUMPOR *v.* SYMMS. (1603)*(Sometimes called Dumpor's Case.)*

[4 COKE, 119.]

In the tenth year of Elizabeth's reign the College of Corpus, Oxford, made a lease for years of certain land to a Mr. Bolde, exacting from him a covenant that he would not alien the property to anybody else without the College's consent. Three years afterwards the College by deed gave him permission to alien to anybody he pleased, and soon afterwards Bolde availed himself of this permission and assigned the term to one Tubb. Tubb, after a brief enjoyment of this world's goods, made his will, devising the lands to his son, and went over to the majority. The son entered, and also died, but intestate, and the ordinary granted administration to a person who assigned the term to the defendant Symms. Thereupon the wrath of the College of Corpus Christi was kindled. Bolde had covenanted with them not to assign without leave, and such a covenant, they said, should have been observed by whoever held the lands. Therefore they entered for the broken condition, and leased to Dumpor for twenty-one years. Dumpor entered, but Symms re-entered, and for doing so Dumpor now brought this action of trespass against him.

Dumpor did not succeed: the case was decided against him on the ground that "*if the lessors dispense with one alienation, they thereby dispense with all alienations after.*"

Useless-
ness of
Dumpor's
case.

"Dumpor's case always struck me as extraordinary," said a judge in 1807 (*f*). "The profession have always wondered at

(*f*) *Brummell v. Macpherson* (1807), 14 Ves. 173.

Dumper's case," said another in 1812 (*g*). Yet such is the vitality of error that Dumper's case remained the law of the land till 1860, when the legislature enacted that "every such licence should, unless otherwise expressed, *extend only to the permission actually given*" (*h*); and the next year another Act was passed prohibiting waivers in particular instances from being interpreted to mean general waivers (*i*).

But though, therefore, Dumper's case is now of merely anti-quarian interest, it is supposed to "lead" to the rather important subject of *waiver of forfeiture*.

The courts lean against forfeiture; and therefore any positive act of the landlord from which it may be inferred that he elected to overlook the breach of covenant, and to continue the tenancy, will be greedily snatched at (*k*). The most satisfactory of the acts which operate as a waiver of forfeiture is *acceptance of rent which has become due since the forfeiture*; and if such rent is accepted, it is of no consequence that the landlord took it under protest and declaring that he did not intend to waive the forfeiture (*l*). But the landlord would not avoid the forfeiture by taking rent due *before* the forfeiture (*m*). When the landlord has once definitely made his election either way, he cannot go back from it; and so his receipt of rent after he has brought ejectment for a forfeiture comes too late to be a waiver (*n*), though there may be evidence of a new tenancy from year to year on the terms of the old lease (*o*). Moreover, the receipt of rent is no waiver of a *continuing breach*, e.g., where the covenant is to keep the demised premises in repair during the term (*p*), or not to use certain rooms in a particular manner (*q*). There cannot be a waiver without knowledge of the forfeiture; and so a son who collected his father's rents was held not to have authority to waive a forfeiture which the old man did not know had occurred (*r*).

Waiver of forfeiture.

Leaning of courts against forfeitures.

Acceptance of rent.

(*g*) Doe v. Bliss (1812), 4 Taunt. 736.

(*h*) 22 & 23 Vict. c. 35, s. 1.

(*i*) 23 & 24 Vict. c. 38, s. 6.

(*k*) Ward v. Day (1864), 5 B. & S. 359; 33 L. J. Q. B. 254.

(*l*) Davenport v. The Queen (1877), 3 App. Ca. 115; 47 L. J. P. C. 8; and see Croft v. Lumley (1855), 5 E. & B. 648; 25 L. J. Q. B. 223.

(*m*) Marsh v. Curteys (1596), Cro. Eliz. 528; Price v. Worwood (1859), 4 H. & N. 512; 28 L. J. Ex. 329.

(*n*) Doe d. Moorecraft v. Meux (1825), 4 B. & C. 606; 1 C. & P. 346; Jones v. Carter (1846), 15 M. & W. 718; Grimwood v. Moss (1872), L. R. 7 C. P. 360; 41 L. J. C. P. 239.

(*o*) Evans v. Wyatt (1880), 43 L. T. 176; 44 J. P. 767.

(*p*) Doe d. Baker v. Jones (1850), 5 Ex. 498; 19 L. J. Ex. 405.

(*q*) Doe d. Ambler v. Woodbridge (1829), 9 B. & C. 376; 4 M. & R. 303.

(*r*) Doe d. Nash v. Birch (1836), 1 M. & W. 402.

Covenant
by tenant
not to
assign
without
consent.

It is a very common condition in a lease that the tenant *shall not assign* without his landlord's consent. It has been held that this condition is not broken by a *compulsory assignment by law*; under the bankruptcy laws, for instance, or under a railway company's Act(s). But by inserting express words to that effect in the lease the lessor may make a compulsory assignment a ground of forfeiture; and a deed of assignment in trust for creditors registered under the Bankruptcy Act, 1861, s. 194, was held to work a forfeiture(t). *Marriage* has been held not to be a breach of the condition against alienation(u); nor (probably) is a *bequest* of the term(x). *Letting lodgings* has been held not to be a breach of a covenant not to *underlet*(y).

Consent
"not to be
arbitrarily
withheld."

Sometimes the covenant a tenant enters into is that he will not assign without his landlord's consent, "*such consent not being arbitrarily withheld.*" These words, it has been held, do not amount to a covenant by the lessor that he will not refuse arbitrarily, but simply enable the lessee, if the lessor refuses his consent arbitrarily, to assign without any breach of covenant(z).

Relief
against
forfeitures.

Forfeiture for wrongful assignment cannot be relieved against under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14(a). That section, however, considerably extends the power of the Court to relieve against forfeitures(b); but application for relief must be made before the lessor has re-entered(c).

Reference should also be made to the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), which enables the Court to protect under-lessees on the forfeiture of superior leases; and this provision extends to cases in which the Court would have no power to grant relief to the lessee himself(d).

(s) *Doe d. Mitchinson v. Carter* (1798), 8 T. R. 57; *Slipper v. Tottenham Ry. Co.* (1867), L. R. 4 Eq. 112; 36 L. J. Ch. 841.

(t) *Holland v. Cole* (1867), 1 H. & C. 67; 31 L. J. Ex. 481.

(u) *Anon.*, Moor, 21.

(x) *Fox v. Swann* (1655), Style, 483; *Doe v. Bevan* (1815), 3 M. & S. 333.

(y) *Doe d. Pitt v. Laming* (1814), 4 Camp. 77.

(z) *Treloar v. Bigge* (1874), L. R. 9 Ex. 151; 43 L. J. Ex. 95; *Sear v. House Property Co.* (1880), 16 Ch. D. 387; 50 L. J. Ch. 77.

(a) See *Barrow v. Isaacs*, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179; and 55 & 56 Vict. c. 13, s. 2, subss. (2) and (3).

(b) See *Quilter v. Mapleson* (1882), 9 Q. B. D. 672; 52 L. J. Q. B. 44; *Lock v. Pearce*, [1893] 2 Ch. 271; 62 L. J. Ch. 582.

(c) *Rogers v. Rice*, [1892] 2 Ch. 170; 61 L. J. Ch. 573.

(d) *Highgate or Cholmeley School v. Sewell*, [1894] 2 Q. B. 906; 63 L. J. Q. B. 820. And see *Nind v. Nineteenth Century Building Society*, [1894] 2 Q. B. 226; 63 L. J. Q. B. 636.

Assignment of Choses in Action.

BRICE v. BANNISTER. (1878)

[89.]

[3 Q. B. D. 569 ; 47 L. J. Q. B. 722.]

Mr. Gough, ship-builder, agreed to build a ship for Mr. Bannister, ship-owner, for 1,375*l*. After this agreement had been entered into, Mr. Gough gave one of his creditors, Mr. Brice, solicitor, of Bridgwater, the following order, addressed to Mr. Bannister :—

*“I do hereby order, authorise, and request you to pay to Mr. William Brice, solicitor, Bridgwater, the sum of 100*l*. out of money due or to become due from you to me, and his receipt for same shall be a good discharge.”*

Directly Brice received this order, he gave notice of it to Bannister in the following terms :—

*“I hereby give you notice that by a memorandum in writing dated the 27th of October, 1876, John Gough, of this place, authorised and requested you to pay me the sum of 100*l*. out of money due or to become due from you to him, and my receipt for the same shall be a good discharge.”*

Bannister seems to have thought that, as he had had nothing to do with this arrangement between Gough and Brice, it did not in any way concern him, and in spite of the notice, paid the whole of the money for the ship to Gough.

This was an action by Brice, and it was held that the instrument in writing constituted a valid assignment of the 100*l*. “It does seem to me,” said Bramwell, L. J., “a strange thing, and hard on a man, that he should enter into a contract with another, and then find that, because that other has entered into a contract with a third, he, the first man, is unable to do that which is reasonable and

just he should do for his own good. But the law seems to be so : and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon."

Chose in action not assignable at common law.

Judicature Act, 1873.

Previously to 1873—with exceptions, however, in favour of bills of exchange, and life or marine policies (e),—a chose in action could not be effectively assigned at law, though it could in equity. But the Judicature Act, 1873, provides (f) that—

Any ABSOLUTE ASSIGNMENT, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

It has recently been held, by Chitty, J., that this provision is retrospective, and applies to assignments of choses in action made before that Act came into operation (g).

Assignor reserving rights.

In the recent case of *National Provincial Bank v. Harle* (h), where the mortgagee of some premises had assigned to his bankers, as security for the balance of his banking account, the sum due on the mortgage deed, *subject to his right to have an account and for the reconveyance of the premises on certain conditions*, it was held that the assignment was not absolute but only "by way of charge." This case, however, was disapproved in the more recent case of *Tancred*

(e) See 30 & 31 Vict. c. 144, an1 31 & 32 Vict. c. 86; 3 & 4 Anne, c. 9.

(f) Sect. 25, sub-s. (6).

(g) *Dibb v. Walker*, [1893] 2 Ch. 429; 68 L. T. 610.

(h) (1881), 6 Q. B. D. 626; 50 L. J. Q. B. 437.

v. Delagoa Bay Co. (i), where it was held that a mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment to the mortgagee, was "an absolute assignment (not purporting to be by way of charge only)" within the above section of the Judicature Act.

In another case (k) the plaintiffs had sub-let a portion of premises in Baker Street, of which they had a lease, to the defendant. They afterwards assigned their interest in the premises to a person named Burrows, agreeing with him in writing that, notwithstanding the assignment, they should receive the rent due from the defendant for the remainder of her lease; and notice of this agreement was given to the defendant. The defendant afterwards surrendered her lease to Burrows, and in an action for rent claimed as accruing after the surrender it was held that, even if there was a valid assignment of a chose in action, still that the plaintiffs could not recover, for that *the assignment was of rent to become due, whereas no rent had accrued due after the surrender*, and the defendant could not be prevented by the agreement between the plaintiffs and Burrows from surrendering her lease to Burrows. It seems to be doubtful, however, whether there was in this case any valid assignment within the sub-section.

Assign-
ment of
rent not
yet due.

In *Burlinson v. Hall* (l) debts had been assigned by deed to the plaintiff upon trust that he should receive them, and out of them pay himself a sum due to him from the assignor, and pay the surplus to the assignor. It was held that this was an "absolute assignment (not purporting to be by way of charge only)," and that the plaintiff might sue in his own name for the debts.

Reference may also be made to the recent case of *Western Wagon Co. v. West* (m). There P. mortgaged freehold property to the defendants, to secure £7,500, and further advances up to £10,000, which the defendants contracted to make. P. made a second mortgage of the same property to the plaintiffs to secure £1,000, and further advances up to £2,500, and assigned to them his right, under the contract in the first mortgage, to call for and require payment from the defendants of the further advances therein mentioned, and the full benefit of the contract. The plaintiffs gave notice of this assignment to the defendants, but, notwithstanding

Western
Wagon Co.
v. West.

(i) (1889), 23 Q. B. D. 239; 58 L. J. Q. B. 459. And see *Comfort v. Betts*, [1891] 1 Q. B. 737; 60 L. J. Q. B. 656.

(k) *Southwell v. Scotter* (1880), 49 L. J. Ex. 356; 44 J. P. 376.

(l) (1884), 12 Q. B. D. 347; 53 L. J. Q. B. 222. But see the recent case of *Tancred v. Delagoa Bay Co.* (1889), *supra*.

(m) [1892] 1 Ch. 271; 61 L. J. Ch. 241. And see *May v. Lano* (1894), 64 L. J. Q. B. 236.

the notice, the defendants subsequently made a further advance of £500 to P. The plaintiffs thereupon brought an action to recover from the defendants personally the sum of £500 so paid by them to P., or damages for breach of contract. But it was held that no money or fund was bound by the contract to make further advances which created no debt, and that, on this ground, *Brice v. Bannister* was distinguishable and did not apply. It was also held that, whether the assignment did or did not fall within sect. 25, sub-s. (6), of the Judicature Act, 1873, the plaintiffs could not sue for damages in their own right, but only in the right of their assignor P. who, on the facts, had sustained no damage, and that on this point also the plaintiffs' claim failed.

Other cases.

Other cases on the subject that may usefully be referred to are *Buck v. Robson* (1878), 3 Q. B. D. 686; 48 L. J. Q. B. 250; *Young v. Kitchen*, 3 Ex. D. 127; 47 L. J. Ex. 579; *Re Sutton's Trusts* (1879), 12 Ch. D. 175; *Schröder v. Cent. Bank of London* (1876), 34 L. T. 735; 24 W. R. 710; *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149; 49 L. J. Q. B. 321; *Re Tritton, Ex parte Singleton* (1889), 61 L. T. 301; 6 M. B. R. 250; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; 56 L. J. Ch. 43; *Gason v. Rich* (1887), 19 L. R. Ir. 391.

Mortgages.

It seems that under the Conveyancing Act, 1881, the transferee of a statutory mortgage may sue on it in his own name (*n*).

Novation.

Novation may be just mentioned here. It occurs where a third party undertakes the liability of the contract, and is accepted by the creditor in substitution for the original contractor (*o*). This mode of discharge receives its commonest illustration in the acceptance by policy holders of the transfer of their policies, and in changes in firms of partners.

(*n*) 44 & 45 Vict. c. 41, s. 27.

(*o*) "Præterea novatione tollitur obligatio. Veluti si id quod tu Seio debeas, a Titio dari stipulatus

sit. Nam interventu novæ personæ nova nascitur obligatio, et prima tollitur translata in posteriorem." Just. Inst. 3, 29, 3.

Covenants Running with the Land.

SPENCER v. CLARK. (1583)

[90.]

(Sometimes called Spencer's Case.)

[5 REP. 61.]

Spencer let a house and grounds to Smith for twenty-one years, and Smith covenanted to build a brick wall on the lands let to him. Smith assigned the demised premises to Jones, without having made the least attempt at building the brick wall. But Jones could not live there either, and he in his turn passed on the place to Clark. Meanwhile nobody had built the wall, and Spencer called on Clark to do it, saying that as the assignee he was bound by Smith's covenant.

It was decided, however, that Clark was not bound to build the wall, Smith not having covenanted for his assigns, but *only for himself*, as to a subject-matter *not in existence* at the time of the covenant.

A covenant is said to *run with the land* when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. Running with land.

A covenant is said to *run with the reversion* when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion. Running with reversion.

At common law covenants run with the land, but not with the reversion. 32 Hen. VIII. c. 34, however, corrected that anomaly (*p*).

The law on the subject of covenants running with the land may be summed up as follows :—

(1.) Suppose the lessee who makes the covenant *omits all mention of his assigns*, and thinks only of himself. (1.) Assigns not mentioned.

(a) If the covenant has to do with something *not in existence* at the time the lease is made, the assignee is not bound (*q*). This is precisely the case of *Spencer v. Clark*. The brick wall was not in

(*p*) See also 44 & 45 Vict. c. 41, ss. 10, 11, 12.

(*q*) *Doughty v. Bowman* (1848), 11 Q. B. 444; 17 L. J. Q. B. 111.

existence at the time the lease was made, and indeed history does not record that it had any subsequent existence.

Minshull v.
Oakes, bad
law.

In *Minshull v. Oakes*(*r*), however, the Court expressed their opinion that it was not consistent with reason that the naming of the assigns in a covenant should vary the liability.

(b) "When the covenant extends to a thing *in esse*, *parcel of the demise*, the thing to be done by force of the covenant is in a manner annexed and appurtenant to the thing demised, and shall run with the land, and shall bind the assignee, although he be not bound by express words" (*s*).

Particular
covenants
held to run
with land.

"The following covenants seem to run with the land, so as to bind the assignee, whether of the reversion or the term, although not named:—A covenant to pay rent or taxes, or to repair, or to leave in repair; to maintain a sea wall *in esse* (*t*); to repair, renew, and replace tenants' fixtures and machinery fixed to the premises (*u*); not to plough; to use the land in a husbandlike manner; to lay dung on the demised land annually; to reside on the demised premises during the term; to permit the lessor to have access to two rooms excepted from the demise; to carry all the corn produced on the demised land to the lessor's mill to be ground (*x*); to leave the land as well stocked with game at the end of the term as it was found to be at the beginning of it (*y*); to supply demised houses with good water; to repair, and pay ground rent; for quiet enjoyment; to produce title-deeds; to make further assurance; to renew the lease; to endeavour to procure a renewal of the lease for another life (in an underlease by lessee for lives); and to build a new smelting mill in lieu of an old one in a lease of mines (*z*). There is also authority that the covenant to insure (*a*), the covenant not to assign or sub-let without licence (*b*), and the covenant not to carry on a particular trade (*c*), run with the land" (*d*).

Moreover all implied covenants run with the land.

(2.) As-
signs men-
tioned.

(2.) Suppose, however, that the lessee *covenants for his assigns* as well as for himself.

(a) The assignee is, of course, liable in case (b) of (1).

(b) But he is also bound in case (a) of (1), provided that what is to be done is to be done *on the demised premises* (*e*).

(*r*) (1858), 2 H. & N. 793; 27 L. J. Ex. 194.

(*s*) Per cur. in *Bally v. Wells* (1769), 3 Wils. 25.

(*t*) *Morland v. Cook* (1868), L. R. 6 Eq. 252; 37 L. J. Ch. 825.

(*u*) *Williams v. Earle* (1868), L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*x*) *Vyryan v. Arthur* (1823), 1 B. & C. 410; 2 D. & R. 670.

(*y*) *Hooper v. Clark* (1867), L. R.

2 Q. B. 200; 36 L. J. Q. B. 79.

(*z*) *Sampson v. Easterby* (1829), 9 B. & C. 505; 4 M. & R. 422.

(*a*) *Vernon v. Smith* (1821), 5 B. & Ad. 1.

(*b*) *Williams v. Earle*, *supra*.

(*c*) *Congleton v. Pattison* (1808), 10 East, 130.

(*d*) *Woodf. Land. & Ten.* (14th ed.), p. 168.

(*e*) *Bally v. Wells*, *supra*.

Clark, for instance, would have had to build the wall if Smith had covenanted for his assigns.

(c) The assignee though expressly named, is not bound by a covenant which is merely personal or collateral to the demised premises.

“The following covenants seem to be personal covenants, so as not to bind the assignee:—A covenant by a lessor to pay on a valuation for all trees planted, or all improvements made, by the lessee during the term; to give the lessee the option of pre-emption of a piece of ground adjoining the demised premises; a covenant by lessee to pay, in addition to rent reserved, ten per cent. on the outlay which the lessor should make in improving the buildings; not to keep a beer shop within a certain distance of the demised premises (*f*); a covenant to pay rent and repair, made with a mortgagor and his assigns, in a lease granted by himself together with the mortgagee; a covenant in an underlease whereby the lessor covenanted to observe, and indemnify the lessee against, the covenants in the superior lease, one of which was to build several houses on the land (*g*); and a covenant by lessee for himself, his executors, and assigns, not to have persons to work in a mill to be erected on the demised premises who were settled in other parishes without a parish certificate. Where the lessee of a theatre agreed to repay money lent to him by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two boxes (not specified), and afterwards assigned his interest, it was held that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes” (*h*).

There is an obligation implied by law on the assignee of a lease to indemnify the original lessee against breaches of covenants running with the land committed during his own tenancy, the lessee being in the position of surety to the lessor for the assignee (*i*).

It is to be observed that there may be covenants respecting land between persons who do not stand to one another in the relation of landlord and tenant, and some of such covenants run with the land. It will be convenient to divide these covenants into two classes:—

(1.) Covenants made by a person *with* the owner of land to do something in respect of that land.

(*f*) *Thomas v. Hayward* (1869), L. R. 4 Ex. 311; 38 L. J. Ex. 175. Bing. N. C. 125; 2 Scott, 220; Woodf. p. 178.

(*g*) *Doughty v. Bowman*, *supra*; but see *Martyn v. Clue* (1852), 18 Q. B. 661; 22 L. J. Q. B. 147. (*i*) *Moule v. Garrett* (1872), L. R. 7 Ex. 101; 41 L. J. Ex. 62; *Wolveridge v. Steward* (1833), 1

(*h*) *Flight v. Glossopp* (1835), 2 Cr. & M. 644; 3 M. & S. 561.

Personal
covenants.

Assignee
indemnifies
lessee.

Other
covenants
respecting
land.

With land-
owner.

The benefit of such a covenant (*e. g.*, for title) runs with the land, so that each successive transferee who is in of the same estate as the original covenantee was may enforce it (*k*). It would appear that the covenantor may be a mere stranger.

By land-owner.

(2.) Covenants made *by* the owner of land to do something in respect of that land.

Do not generally run with land.

Such covenants (except, perhaps, where the covenantee has some interest in the land independently of the covenant) do not run with the land. If they did, a purchaser might find himself saddled with obligations of which he was ignorant, and which would have deterred him from buying, had he known of them; and the law looks with disfavour on impediments to the free circulation of property (*l*). If, however, a person takes premises with full knowledge of the existence of such a covenant, he may be bound by it (*m*); and, indeed, it is his duty to inquire into the title of his vendor or lessor (*n*). Thus, in the case of *Patman v. Harland* (*o*), it appeared that in 1876 a conveyance in fee of building land at Wimbledon had been made to a purchaser subject to a covenant against erecting on the land anything except a *private house*. The land was afterwards leased, and the lessee put up a corrugated iron building as an *art studio for ladies*. In an action by the original vendor against the lessee it was held that any representations by the lessor to the lessee that there was no restrictive covenant did not protect the lessee from being affected with constructive notice of the lessor's title, and that a purchaser who has notice of a deed necessarily affecting the vendor's title has notice of the contents of the deed. It was also held that the doctrine that a lessee has constructive notice of his lessor's title is not altered by the Vendor and Purchaser Act, 1874 (*p*), but a lessee who is within that Act is in the same position as if he had contracted not to look into his lessor's title.

But purchasers with notice may be bound.

Patman v. Harland.

Doctrines not to be extended too far.

The recent case of *Haywood v. The Brunswick Permanent Benefit Building Society* (*q*), however, shows that these doctrines

(*k*) *Kingdon v. Nottle* (1815), 4 M. & S. 53; and see *Sharp v. Waterhouse* (1857), 7 E. & B. 816; 3 Jur. N. S. 1022.

(*l*) *Keppel v. Bailey* (1834), 2 My. & K. 517.

(*m*) *Tulk v. Moxhay* (1848) (the Leicester Square case), 2 Ph. 774; *Luker v. Dennis* (1877), 7 Ch. Div. 227; 47 L. J. Ch. 174; *Spencer v. Bailey* (1893), 69 L. T. 179.

(*n*) *Wilson v. Hart* (1866), L. R. 1 Ch. 463; 35 L. J. Ch. 569; and see *Thornewell v. Johnson* (1881), 50 L. J. Ch. 641; 44 L. T. 768;

Nottingham Patent Brick and Tile Co. v. Butler (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 280; *In re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; 62 L. J. Ch. 90; *Davis v. Leicester Corporation*, [1894] 2 Ch. 208; 63 L. J. Ch. 440; *Groves v. Loomes* (1885), 55 L. J. Ch. 52; 53 L. T. 592; *Brown v. Inskip* (1884), 1 C. & E. 231. (*o*) (1881), 17 Ch. D. 353; 50 L. J. Ch. 642.

(*p*) 37 & 38 Vict. c. 78, s. 2.

(*q*) (1882), 8 Q. B. D. 403; 51 L. J. Q. B. 73.

are not to be pushed too far. A plot of ground was conveyed subject to a rent-charge, the grantee for himself, his heirs, executors, and assigns, covenanting with the grantor, his heirs and assigns, that he, the grantee, his heirs or assigns, "will erect, within two years from the date of these presents, and at all times thereafter keep in good and tenantable repair and condition, and from time to time, when necessary, will rebuild upon the said plot of land such good and substantial messuages or other buildings as shall be of the annual letting value of at least double the amount of rent-charge limited in respect of such plot." In an action by the assignee of the grantor against mortgagees in possession to an assignee of the grantee for breach of this covenant, it was held that the covenant did not run with the land so as to make the defendants liable at common law, and that it was not a covenant which could be enforced in equity against assignees with notice. "It strikes me," said Lindley, L. J., "that this is an attempt to extend the doctrine of *Tulk v. Moxhay* too far." See, however, the recent cases of *Collins v. Castle* (1887), 36 Ch. D. 243; 57 L. J. Ch. 76; *Tucker v. Vowles*, [1893] 1 Ch. 195; 62 L. J. Ch. 172; *Tindall v. Castle* (1893), 62 L. J. Ch. 555; 3 R. 418; *Meredith v. Wilson* (1893), 69 L. T. 336.

The following cases on this subject may be referred to:—*Sayers v. Collyer* (1884), 28 Ch. D. 103; 54 L. J. Ch. 1; L. C. & D. Ry. Co. v. Bull (1882), 47 L. T. 413; *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750; 55 L. J. Ch. 633; *Fleetwood v. Hull* (1890), 23 Q. B. D. 35; 58 L. J. Q. B. 341; *Clegg v. Hands* (1890), 44 Ch. D. 503; 59 L. J. Ch. 477; *Everett v. Remington*, [1892] 3 Ch. 148; 61 L. J. Ch. 574.

As to how far a restrictive covenant justifies a vendee in claiming a declaration that the vendor has not shown a good title, the case of *In re Higgins and Hitchman's Contract* (1882), 21 Ch. D. 95; 51 L. J. Ch. 772, may be consulted. There, on the sale of a villa at St. Leonards, the vendor agreeing to deduce a good title, it appeared that the vendor's predecessor in title had covenanted not to use the premises as gas-works or a public-house. It was held that this covenant constituted a fatal objection to the title, although the respectability of the neighbourhood made it extremely unlikely that anybody would ever want to convert the villa into gas-works or a public-house.

Restrictive
covenants.

An action may be maintained by one tenant in common of a reversion for breach of a covenant running with the land, without joinder of his co-tenants in common as plaintiffs, where the severance of the reversion takes place after the demise. *Roberts v. Holland*, [1893] 1 Q. B. 665; 62 L. J. Q. B. 621.

DISCHARGE.

Accord and Satisfaction.

[91.]

CUMBER *v.* WANE. (1719)

[1 STRANGE, 426.]

WANE owed Cumber 15*l.*, and wondered how he should pay it. In a genial moment Cumber rejoiced his debtor's heart by telling him that if he paid 5*l.* it would do. Wane thanked him, sat down quickly, and wrote out his promissory note for that amount. But after a while it repented Cumber of his generosity, and he went to law for the whole 15*l.* Wane pleaded that the plaintiff had agreed to accept 5*l.* in full satisfaction for the debt of 15*l.*, and that he had paid the 5*l.* Though perfectly true, this was not considered a satisfactory plea, and Wane was compelled to pay the remaining 10*l.*

Principle
of leading
case.

The principle on which *Cumber v. Wane* proceeds is that there is *no consideration* for the relinquishment of the residue; but whenever there is a benefit, or legal possibility of a benefit, to the creditor, the doctrine that the payment of a smaller sum is no satisfaction of a larger one does not apply. Therefore—

Different
kinds.

(1.) The payment of something of a different nature, though of less value, *e. g.*, an old arm-chair (which may have a fancy value quite apart from its intrinsic usefulness), may be pleaded in satisfaction of a debt of 10,000*l.* So a *negotiable instrument*—by the way, it must be taken that in *Cumber v. Wane* the note was *not* negotiable—for 5*l.* might very successfully be pleaded in satisfac-

tion of a debt of 15*l.* (*a*). In the case of *Goddard v. O'Brien* (*b*) this point, which had formerly been regarded as doubtful, was established beyond question.

(2.) So may a payment, smaller indeed, but *earlier* than originally stipulated for, or made at a *different place*. *Bis dat qui cito dat* (*c*). Payment earlier or at different place.

(3.) So when there is a *dispute* as to the exact sum due (*d*). Dispute.

(4.) The doctrine does not apply to *unliquidated damages*, for it is not known what is really due to the plaintiff. Railway companies occasionally succeed in entrapping their victims into agreements of this kind. In such a case the question for the jury is whether the plaintiff's mind went with the terms of the paper he signed (*e*). Unliquidated damages.

(5.) Under the Bankruptcy Act, 1890, a debtor may be discharged from obligations by his creditors accepting a composition (*f*). Composition with creditors.

It is to be observed that a smaller sum may be pleaded in satisfaction of a greater if there is a *receipt under seal* (*g*). Moreover, payment of part may sometimes be *evidence of a gift* of the remainder; or, again, there may be a remedy by way of set-off or counter-claim. Receipt under seal.

To be a good discharge, *an accord must be executed* (*h*), unless, indeed, the jury find that what the plaintiff accepted in satisfaction was not the *performance*, but the *promise* (*i*).

In the recent case of *Day v. McLea* (*k*), the plaintiffs claimed a sum of money for damages for breach of contract, and the defendants sent a cheque for a less amount, with a form of receipt "in full of all demand." The plaintiffs kept the cheque and sent a receipt on account, and sued for the balance of their claim. The Court of Appeal held that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but that it was a question of fact on what terms the cheque was kept.

Accord and satisfaction made *by a stranger* on behalf of the defendant, and adopted by the plaintiff, is a good defence (*l*).

(*a*) *Sibree v. Tripp* (1846), 15 M. & W. 23; 15 L. J. Ex. 318.

(*b*) (1882), 9 Q. B. D. 37; 46 L. T. 306.

(*c*) *Pinnell's case* (1602), 5 Co. 117.

(*d*) *Cooper v. Parker* (1855), 15 C. B. 822; 24 L. J. C. P. 68.

(*e*) *Rideal v. G.W. Ry. Co.* (1859), 1 F. & F. 706; and see *Lee v. Lanc. & Yorks. Ry. Co.* (1871), L. R. 6 Ch. 527; 25 L. T. 77.

(*f*) 53 & 54 Vict. c. 71, s. 3.

(*g*) *Fitch v. Sutton* (1804), 5 East, 230.

(*h*) *Edwards v. Chapman* (1836), 1 M. & W. 231; 4 D. C. P. 732.

(*i*) *Hall v. Flockton* (1851), 16 Q. B. 1039; 20 L. J. Q. B. 201; and *Evans v. Powis* (1847), 1 Ex. 601; 11 Jur. 1043.

(*k*) (1889), 22 Q. B. D. 610; 58 L. J. Q. B. 293.

(*l*) *Jones v. Broadhurst* (1850), 9

To an action by several joint creditors accord and satisfaction with any one of them, without the necessity of showing that he had authority from the rest to settle, is an answer (*m*). And so accord and satisfaction made by one of several parties jointly liable discharges all (*n*).

Beer *v.*
Foakes.

In Beer *v.* Foakes (*o*), the principle of Pinnel's case and Cumber *v.* Wane was discussed. Judgment for a specific sum having been obtained by the plaintiff in an action, an agreement in writing was made between the plaintiff and the defendant whereby, in consideration that the defendant would pay part of the sum on the signing of the agreement, and the remainder to the plaintiff or her nominee by equal half-yearly instalments, the plaintiff undertook not to take any proceedings on the judgment. The defendant duly performed all the terms of the agreement on his part, but it was held that the agreement was not binding on the plaintiff, there being no consideration for it, and that therefore the plaintiff was entitled to issue execution for interest on the judgment debt.

At common law accord and satisfaction could not be pleaded in answer to an action on specialty, but this was not the rule at equity, and now, the latter view prevailing, accord and satisfaction is a good defence to an action on a deed (*p*).

Second
point of
leading
case.

A point of practice decided in the leading case was that *if one party die during a curia advisari vult, judgment may be entered nunc pro tunc*. This is on the principle, *Actus curie nemini facit injuriam* (*q*). See also Ackroyd *v.* Smithies (1885), 54 L. T. 130; 50 J. P. 358.

C. B. 173; Randall *v.* Moon (1852), 12 C. B. 261; 21 L. J. C. P. 226. See also Cook *v.* Lister (1863), 13 C. B. N. S. 543; 32 L. J. C. P. 121.

(*m*) Wallace *v.* Kelsall (1840), 7 M. & W. 264; 4 Jur. 1064. See the recent case of Steeds *v.* Steeds (1889), 22 Q. B. D. 537; 58 L. J. Q. B. 302.

(*n*) Nicholson *v.* Revill (1836), 4 A. & E. 675; 6 N. & M. 192.

(*o*) (1884), 9 App. Ca. 605; 54 L. J. Q. B. 130. This case was

distinguished in Bidder *v.* Bridges (1887), 37 Ch. D. 406; 57 L. J. Ch. 300; and *followed* in Underwood *v.* Underwood, [1894] P. 204; 63 L. J. P. 109; where a promise to release arrears and future payments of alimony was held not to be supported by a consideration of a sum less than the arrears.

(*p*) See Steeds *v.* Steeds, *supra*.

(*q*) See Turner *v.* L. & S. W. Ry. Co. (1874), L. R. 17 Eq. 561; 43 L. J. Ch. 430.

Tender.

FINCH v. BROOK. (1834)

[92.]

[1 BING. N. C. 253; 2 SCOTT, 511.]

Money disputes having arisen between Mr. Finch and Mr. Brook, and litigation being imminent, Mr. Brook sent his attorney to Mr. Finch to pay what he believed to be the amount of his debt. Accordingly, Brook's attorney called on the creditor, and said, "I am come, Mr. Finch, to pay you the 1*l.* 12*s.* 5*d.* which Mr. Brook owes you," whereupon he put his hand into his pocket to come at the coin. Finch, however, testily replied, "I can't take it, the matter is now in the hands of my attorney," and so the lawyer took his hand out of his pocket again without producing the money. The question was whether this constituted a valid tender, and it was held that it did *not*, for there was *neither production of the money nor dispensation with production (v).*

The reason why the law attaches so much importance to the production of the money is that "the sight of it may tempt the creditor to yield." A tender, however, is valid, though there is no production, *if the creditor dispenses with it*; as, for instance, where a debtor called on his creditor and said he had 8*l.* 18*s.* 6*d.* in his pocket to pay the debt with, whereupon the creditor exclaimed, "*You needn't give yourself the trouble of offering it, for I'm not going to take it*" (s). But Lord Tenterden, C. J., thought there was not a sufficient tender where the production of the money was prevented by the creditor leaving the room after the debtor had offered to pay it, and whilst he was in the act of taking it from his pocket (t).

Production dispensed with.

A valid tender must be *unconditional*. "*If you will give me a stamped receipt, I will pay you the money,*" said a debtor once, and he pulled out the money as he spoke. But the tender was held bad

Unconditional.

(v) The Court, however, seems to have thought that, if the jury had chosen to do so, they might very well have inferred dispensation.

(s) Douglas v. Patrick (1790), 3 T. R. 638.

(t) Leatherdale v. Sweptstone (1828), 3 C. & P. 312.

for the condition (*u*). A tender made "*under protest*," is not a conditional tender (*x*).

To or by
agent.

The tender need not be made to the creditor himself. It *may be made to an agent* authorized to receive payment of the debt (*y*). Conversely, the tender may be made by an agent of the debtor (*z*). And so tender to one of several joint creditors, or by one of several joint debtors, is good.

Whole
debt.

The tender must be *of the whole debt*. But if the creditor's claim consists of a number of distinct items, the debtor may make a good tender of payment of any one of them, provided that he carefully specifies the particular item he wishes to dispose of (*a*). A tender may, of course, be made of a larger sum of money than the amount of the debt (*b*), but the debtor must not demand change (*c*); if, however, the creditor does not object to the tender *on that account*, but for some collateral reason, such as a demand for a larger sum, the tender will be good (*d*).

Current
coin.

The tender must be *in the current coin of the realm*. Gold is good to any amount; but silver is not beyond 40s., nor copper beyond a shilling (*e*). A Bank of England note payable to bearer is a legal tender for all sums above 5*l.* (*f*). A tender in country notes or by cheque is good if the only reason given by the creditor at the time for not accepting it is that the amount of the debt is larger (*g*).

Debt not
extin-
guished.

It is scarcely necessary to say that the effect of a valid tender is not to extinguish the debt. On the contrary, it is *an admission* of the contract. But what it does is to put the plaintiff in the wrong so far as his action is concerned. He is exposed as the litigious oppressor, while the defendant stands forth as the virtuous citizen who has all along been ready and anxious to discharge his liabilities (*h*). Accordingly, a valid tender stops the further accrual of interest (*i*). But the plea of tender must be accompanied by payment into Court of the money tendered (*k*).

(*u*) *Laing v. Meader* (1824), 1 C. & P. 257. See, however, *Richardson v. Jackson* (1841), 8 M. & W. 298; 9 D. P. C. 715.

(*x*) *Scott v. Uxbridge and Rickmansworth Ry. Co.* (1866), L. R. 1 C. P. 596; 3 L. J. C. P. 293; *Greenwood v. Sutcliffe*, [1892] 1 Ch. 1; 61 L. J. Ch. 59.

(*y*) *Moffatt v. Parsons* (1814), 5 Taunt. 307; and see *Finch v. Boning* (1879), 4 C. P. D. 143; 40 L. T. 484.

(*z*) *Read v. Goldring* (1813), 2 M. & S. 86.

(*a*) *Strong v. Harvey* (1825), 3 Bing. 304; 11 Moore, 72; and *Hardingham v. Allen* (1848), 5

C. B. 793; 17 L. J. C. P. 198.

(*b*) *Dean v. James* (1833), 4 B. & Ad. 546; 1 N. & M. 303.

(*c*) *Betterbee v. Davis* (1811), 3 Camp. 70.

(*d*) Per Lord Abinger, C. B., in *Bevans v. Rees* (1839), 5 M. & W. 306; 3 Jur. 608.

(*e*) 33 Vict. c. 10, s. 4.

(*f*) 3 & 4 Will. IV. c. 98, s. 6.

(*g*) *Polglass v. Oliver* (1831), 2 C. & J. 15; 2 Tyr. 89.

(*h*) Per cur. in *Dixon v. Clarke* (1848), 5 C. B. 365; 16 L. J. C. P. 237.

(*i*) *Dent v. Dunn* (1812), 3 Camp. 296.

(*k*) R. S. C., Ord. 22, r. 3;

*Alteration of Terms between Creditor and Debtor
releases Surety.*



WHITCHER *v.* HALL. (1826)

[93.]

[5 B. & C. 269 ; 8 D. & R. 22.]

Whitcher agreed to let Joseph Hall have thirty cows for milking at 7*l.* 10*s.* each per annum, and James Hall became surety for the due payment of the money. By-and-by some of the cows died, and the terms of the letting were changed so that Joseph was to have the milking of twenty-eight cows during one part of the year and of thirty-two during the other. James was not consulted on the subject ; and, indeed, it is difficult to see that the alteration in any way prejudiced him. But although there was thus no substantial alteration of the original terms, yet the Court considered that an alteration *was* an alteration, and that James Hall was thereby released from his suretyship.

It may be added that from this opinion Mr. Justice Littledale dissented, citing the maxim *de minimis non curat lex*, by which he meant that the alterations were so trifling as to be not worth considering.

The man who is kind enough to become surety for a friend undertakes a very thankless office ; and the law is jealously anxious to shield him against fraud and imposition. Whitcher *v.* Hall well illustrates the rule that any alteration of the terms of the original agreement by the creditor and the debtor behind the surety's back, will exonerate the surety, unless the rights against him are expressly reserved (*l*).

County Court Rules, Ord. 10, r. 20.
See Griffiths *v.* School Board of
Ystradefodwg (1890), 24 Q. B. D.
307 ; 59 L. J. Q. B. 116.

(*l*) Kearsley *v.* Cole (1846), 16
M. & W. 128 ; 16 L. J. Ex. 115 ;
Price *v.* Barker (1855), 24 L. J.
Q. B. 130 ; 4 E. & B. 760.

The law on the subject was lately summed up by Cotton, L. J., as follows:—

True rule
stated by
Cotton,
L. J.

“The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that *if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety*, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that, in such a case, *the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration*, and that if he has not so consented he will be discharged (*m*). ”

But an alteration in the position of a surety brought about by the act of an employer does not discharge the surety, if the act of the employer has been caused by the fraud of a contractor whose honesty the surety has guaranteed (*n*).

Altering the terms is not the only way in which the surety becomes a free man once more. He is always discharged in the following cases:—

Misrepresentation
or concealment.

(1.) *If there has been a fraudulent misrepresentation to, or concealment from, him (o).*

But the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety in entering into the contract; what he must disclose is simply any arrangement between himself and the debtor which would make the surety's position different from what he would reasonably expect (*p*). “The plaintiff and defendant,” said Holroyd, J., in the case last referred to, “*were not on equal terms*. The former with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating that fact to him,

(*m*) *Holme v. Brunskill* (1877), 3 Q. B. D. 495; 47 L. J. Q. B. 610. See also *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596; 55 L. J. P. C. 47.

(*n*) See *Kingston-upon-Hull Corporation v. Harding*, [1892] 2 Q. B. 494; 62 L. J. Q. B. 55.

(*o*) *Lee v. Jones* (1864), 17 C. B. N. S. 482; 34 L. J. C. P. 131; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(*p*) *Hamilton v. Watson* (1845), 12 Cl. & Fin. 109; *Pidecock v. Bishop* (1825), 3 B. & C. 605; 5 D. & R. 505; and see *Byrne v. Muzio* (1882), 8 L. R. Ir. 396.

suffers him to give the guarantee. That was a fraud upon the defendant, and vitiates the contract." Moreover, as was said by the Lord Chancellor, in *Owen v. Homan* (*q*) (where the surety was an infirm old married woman, living apart from her husband, and the aunt of the debtor), "without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, *he is bound to make inquiry*, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject."

(2.) *If the creditor enters into a binding agreement with the debtor to give him time, unless by such agreement the creditor reserves his rights against the surety* (*r*). Giving time.

The reason why the surety is discharged in this case is that the creditor by giving time to the debtor has, for the time at least, put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal debtor or not, and because the surety cannot in fact have the same remedy against the principal as he would have had under the original contract.

Mere *forbearance or laches*, however, will not discharge the surety (*s*). Nor will a contract *with a stranger* to give time to the principal debtor affect the right against the surety (*t*).

"Where two or more sureties contract severally, the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release" (*u*).

(3.) *If the principal debt is released or satisfied.*

"It may be taken as settled law," said Lord Morris in a recent case (*x*) in the Privy Council, "that where there is an absolute

Debt satisfied.

(*q*) (1853), 4 H. L. C. 997; 20 L. J. Ch. 314.

(*r*) *Rees v. Berrington* (1795), 2 Ves. jun. 540; *Croydon Gas Co. v. Dickinson* (1876), 2 C. P. D. 46; 46 L. J. C. P. 157; but see *York Banking Co. v. Bainbridge* (1880), 43 L. T. 732; *Yates v. Evans* (1892), 61 L. J. Q. B. 416; 66 L. T. 532.

(*s*) *Orme v. Young* (1815), 1 Holt, 81; *Goring v. Edmunds* (1829), 6 Bing. 94; 3 M. & P. 259; *Oriental Financial Corporation v. Overend & Co.* (1871), L. R. 7 Ch. 142; 41 L. J. Ch. 332; *Rouse*

v. Bradford Banking Co., [1894] A. C. 586; 63 L. J. Ch. 890.

(*t*) *Lyon v. Holt* (1839), 5 M. & W. 250; 2 H. & H. 41; *Fraser v. Jordan* (1858), 8 E. & B. 303; 26 L. J. Q. B. 288; *Clarke v. Birley* (1889), 41 Ch. D. 422; 60 L. T. 948.

(*u*) *Ward v. National Bank of New Zealand* (1883), 8 App. Ca. 755; 52 L. J. P. C. 65.

(*x*) *Commercial Bank of Tasmania v. Jones*, [1893] A. C. 313; 62 L. J. P. C. 101.

release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor is a partial discharge only, and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute."

But it may be mentioned here that when several persons join together in a bond of suretyship, *e.g.*, in the sum of 50*l.* each for the honesty of a clerk, they are *separately liable*, so that the payment of 50*l.* by one of them is no answer to an action on the bond against one of the others (*y*).

Consideration not performed. Surety's interest prejudiced.

(4.) *If the creditor omits to do something which was the surety's consideration for entering on the responsibility.*

(5.) *If the person guaranteed does something distinctly injurious to the interest of the surety ;*

e.g., if I am surety for the honest services of a clerk, and his master systematically throws temptations in his way (*z*). But the master's *mere passive inactivity* will not discharge the surety. If, however, he finds out that the servant has been guilty of dishonesty, he must inform the surety, who may withdraw (*a*).

Continuing guaranties.

It often becomes an important and difficult question whether a particular guaranty is a *continuing* one or not ; that is to say, *whether the surety's undertaking is to be confined or not to one transaction.* The question is to be answered by considering the surrounding circumstances, and getting as near as possible to the intention of the parties, the presumption being that it is a continuing guaranty, because "if a party meant to confine his liability to a single dealing, he should take care to say so" (*b*). A man who had a nephew setting up as a butcher gave a cattle-dealer this undertaking :—

Heffield v. Meadows.

"I, John Meadows, of Barwick, in the county of Northampton, will be answerable for 50*l.* sterling that William York, of Stamford, butcher, may buy of Mr. John Heffield, of Donington."

The young butcher made payments at various times to Mr. Heffield, amounting to over 90*l.*, but he afterwards failed to meet

(*y*) *Armstrong v. Cahill* (1880), 6 L. R. Ir. 440.

(*z*) *Smith v. Bank of Scotland* (1813), 1 Dow, 272.

(*a*) *Burgess v. Eve* (1872), L. R. 13 Eq. 450 ; 41 L. J. Ch. 515 ; and see *Guardians of Mansfield Union*

v. Wright (1882), 9 Q. B. D. 683 ; 46 J. P. 200 ; *In re Wolmershausen* (1890), 62 L. T. 541 ; 38 W. R. 537.

(*b*) Per Lord Ellenborough in *Merle v. Wells* (1810), 2 Camp. 413.

his engagements; and the question was whether anything could be got out of Meadows as surety. Meadows strenuously maintained that, as his nephew had paid 90*l.*, and 90*l.* was a larger sum of money than 50*l.*—the amount for which he had undertaken to be liable—the guaranty was at an end. But it was held that, as the object of the guaranty plainly was *to keep the young man going as a butcher*, it was a continuing guaranty, and Meadows must pay (*c*). The cases, however, run pretty close, as may be imagined when it is said that the following was held *not* to be a continuing guaranty:—

“*I hereby agree to be answerable for the payment of 50*l.* for T. Lerigo, in case T. Lerigo does not pay for the gin he receives from you*” (*d*).

A guaranty given *to, or for, a firm* only continues binding after a change in its constitution, when it appears to have been the clear intention that it should so continue (*e*). Guaranties to or for firm.

The death of the surety does not *per se* operate as a revocation of a continuing guaranty, but notice to the creditor determines it as to future advances (*f*). But a guaranty, the consideration of which is given once for all (*e.g.*, admission as an underwriting member at Lloyd's), cannot be determined by the guarantor, and does not cease at his death (*g*). Death of surety.

A surety who has paid his friend's debt is entitled to have transferred to him any securities which the creditor may have held, notwithstanding his ignorance of their existence, or their having been given since he entered on the suretyship (*h*). And if the creditor has so dealt with the security that on payment by the surety it is no use to him, he is discharged to the extent of the security (*i*). On the other hand, however, a creditor is not entitled to the exclusive benefit of a security given by his debtor to the surety (*j*). Transfer of securities to surety.

(*c*) *Heffield v. Meadows* (1869), L. R. 4 C. P. 595; 20 L. T. 746.

(*d*) *Nicholson v. Paget* (1832), 1 C. & M. 48; 5 C. & P. 395.

(*e*) The Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18. “A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in the transactions of which, the guaranty or obligation was given;” and see *Backhouse v. Hall* (1865), 6 B. & S. 507; 34 L. J. Q. B. 141.

(*f*) *Coulthart v. Clementson* (1879), 5 Q. B. D. 42; 49 L. J. Q. B. 204; and see *Harriss v. Fawcett* (1873), L. R. 8 Ch. 866; 42 L. J. Ch. 502; and *Beckett v. Addyman* (1882), 51 L. J. Q. B. 597; 9 Q. B. D. 783.

(*g*) *Lloyd's v. Harper* (1880), 16 Ch. Div. 290; 50 L. J. Ch. 140.

(*h*) 19 & 20 Vict. c. 97, s. 5. See *In re McMyn* (1886), 33 Ch. D. 575; 55 L. J. Ch. 845.

(*i*) *Campbell v. Rothwell* (1877), 47 L. J. Q. B. 144; 38 L. T. 33; and see *Rainbow v. Juggins* (1880), 5 Q. B. D. 422; 49 L. J. Q. B. 718.

(*j*) *In re Walker, Sheffield Banking Co. v. Clayton*, [1892] 1 Ch. 621; 61 L. J. Ch. 234.

Where one of several co-sureties has paid off the debt, he is entitled to the benefit of a proof by the creditor against one of the co-sureties for the full amount of the debt, and his right of proof is not (though his right of receiving dividends is) limited to the sum which, as between him and his co-surety, such co-surety is liable to pay (*k*).

Contribu-
tion.

A surety is also entitled to call on his co-sureties (whether bound by the same instrument or not (*l*)) for *contribution*; and if there are three co-sureties, of whom one has become insolvent, the surety who has been compelled to pay the debt may come upon the remaining solvent surety not merely for an aliquot proportion of the money paid, but for a moiety (*m*). Besides being entitled to contributions from each other, sureties are also entitled to the benefit of all securities which any one of them may have taken (*n*). And when one of several co-sureties has had judgment against him for the whole of the principal debt, though he cannot obtain contribution against the others until he has actually paid more than his own share (*o*), he is entitled to a declaration of his right to contribution, and to a prospective order that on paying his own share he be indemnified by his co-sureties against further liability (*p*).

See also the recent cases of *Lawes v. Maughan* (1884), 1 C. & E. 340; *Carter v. White* (1883), 25 Ch. D. 666; 54 L. J. Ch. 138; *Ashby v. Day* (1885), 54 L. J. Ch. 935; 54 L. T. 408; *Oddy v. Hallett* (1885), 1 C. & E. 532; and *The Mayor of Durham v. Fowler* (1889), 22 Q. B. D. 394; 58 L. J. Q. B. 246; *Bolton v. Salmon*, [1891] 2 Ch. 48; 60 L. J. Ch. 239; *Barber v. Mackrell* (1893), 68 L. T. 29; 41 W. R. 341.

(*k*) *In re Parker, Morgan v. Hill*, [1894] 3 Ch. 400; 64 L. J. Ch. 6. But whether the result would be the same if the creditor had never proved, and the surety, who had paid the debt, had, in the first instance, claimed against his co-surety, *quære*, see per Davey, L.J.

(*l*) *Dering v. Winchelsea* (1787), 1 Cox, 318; and see *Ramskill v. Edwards* (1885), 31 Ch. Div. 100; 55 L. J. Ch. 81.

(*m*) 36 & 37 Vict. c. 66, s. 25, sub-s. (11).

(*n*) *Steel v. Dixon* (1881), 17 Ch. D. 825; 50 L. J. Ch. 591; *Berridge v. Berridge* (1890), 44 Ch. D. 168; 59 L. J. Ch. 533.

(*o*) *In re Snowden* (1881), 17 Ch. D. 44; 50 L. J. Ch. 540; and see *Davies v. Humphreys* (1840), 6 M. & W. 153; 4 Jur. 250; *In re Macdonald* (1888), W. N. 130.

(*p*) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 62 L. J. Ch. 773.

Material Alteration Vitiates Written Instrument.MASTER *v.* MILLER. (1791)

[94.]

[2 H. BL. 141; 5 T. R. 637.]

On March 26th, 1788, Peel and Co., of Manchester, drew a bill for 1,000*l.* on Miller, payable three months after date to Wilkinson and Cooke. This bill they delivered to Wilkinson and Cooke, and Miller afterwards accepted it. Wilkinson and Cooke then indorsed it for value to the plaintiff. But before doing so they made one or two little alterations with the object of improving the document. March 26th they changed into March 20th; and they inserted June 23rd at the top to indicate that the bill would become due on that day. These alterations, *being to accelerate payment and unauthorized*, were held to vitiate the instrument.

ALDOUS *v.* CORNWELL. (1868)

[95.]

[L. R. 3 Q. B. 573; 37 L. J. Q. B. 201.]

In November, 1865, Mr. Cornwell gave his promissory note to this effect—"I promise to pay Mr. Edward Aldous the sum of £125." By-and-by Mr. Aldous asked Mr. Cornwell to pay the £125. Mr. Cornwell was about to do so when he noticed that two words had been added to the note he had made, so that it now ran, "*On demand* I promise to pay, &c." Mr. Cornwell on this refused to pay, pleading that he "did not make the note as alleged." The result of an action, however, was that he was compelled to pay *as the alteration was an immaterial one*, all

notes which express no time for payment being payable "on demand."

Effect of alteration.

The law looks with great disfavour on the alteration of written instruments. Even when the alteration is made with the consent of both parties (unless it be merely to correct a mistake and render the document what it has all along been intended to be), there must be a *new stamp* just as if it were a new contract (*q*).

Pigot's case.

One of the earliest, and for a long time the most important, cases on alteration without consent is Pigot's case (*r*). That case referred only to deeds; but its principle was afterwards extended to bills of exchange, guarantees, bought and sold notes, charter-parties, and other instruments. But the part of the second resolution of Pigot's case, which says that "*if the obligee himself alters the deed, although it is in words not material, yet the deed is void*," is not now law.

Material alteration vitiates.

Suffell v. Bank of England.

A material alteration, no matter by whom, vitiates a written instrument. Thus, in the recent case of *Suffell v. Bank of England* (*s*), it was held that the alteration of a Bank of England note by erasing the number upon it and substituting another was a material alteration which avoided the instrument, so that a *bond fide* holder for value could not afterwards maintain an action on it.

Warrington v. Early.

In *Warrington v. Early* (*t*), it appeared that three persons had made their joint and several promissory note "*with lawful interest*." The holder persuaded two of them, in the absence of the third, to add in the corner, by way of explanation, "*interest at 6 per cent.*"

Vance v. Lowther.

It was held that he could not recover against the third party, as the note had been materially altered. In *Vance v. Lowther* (*u*), a dishonest clerk had absconded with a cheque drawn in his master's favour. After altering the date from March 2nd to March 26th, he passed it to the plaintiff for value. It was held that the alteration was material, and invalidated the cheque, so that the plaintiff, in spite of having acted prudently and uprightly, could not successfully sue the drawer. In this case it was also held that *materiality is a question of law*, and that, in deciding it, reference is to be had to the contract alone, and not to the surrounding circumstances.

Mistake or accident.

But alterations by accident (*e. g.*, by a mischievous little boy tearing

(*q*) *Reed v. Deere* (1827), 7 B. & C. 261; 2 C. & P. 624; *Bowman v. Nichol* (1794), 5 T. R. 537; 1 Esp. 81.

(*r*) (1615), 11 Co. 26.

(*s*) (1882), 9 Q. B. D. 555; 51 L. J. Q. B. 401; and see *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590;

Lowe v. Fox (1887), 12 App. Cas. 206; 56 L. J. Q. B. 480.

(*t*) (1853), 2 E. & B. 763; 23 L. J. Ex. 47.

(*u*) (1876), 1 Ex. Div. 176; 45 L. J. Ex. 200; and see *Harris v. Tenpany* (1883), 1 C. & E. 65; *Pattison v. Luckley* (1875), L. R. 10 Ex. 330; 44 L. J. Ex. 180.

off a seal, or by rats eating it) *or mistake*, do not affect the liability (*x*).

The instrument may be given in evidence *for a collateral purpose*, notwithstanding a material alteration. A landlord once brought an action against a tenant for not cultivating according to the terms of the written agreement between them. The written agreement when produced was found to be stained with an erasure in the habendum, the term of years having been altered from seven to fourteen. As a matter of fact, the defendant was a yearly tenant under a parol agreement which incorporated only so much of the written instrument as was applicable to a yearly holding, so that it did not matter whether the written agreement said 14 or 140 years. For this reason the instrument was admitted in evidence to prove the terms on which the tenant held the land (*y*). Collateral purpose.

With regard to the alteration of bills of exchange, it is to be observed that the law has recently been codified. The 63rd and 64th sections of the Bills of Exchange Act, 1882 (*z*), are as follows:— Act of 1882.

“63.—(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. Cancellation.

“(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

“(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

“64.—(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Alteration of bill.

“Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

(*x*) *Raper v. Birkbeck* (1812), 15 East, 17; *Argoll v. Cheney* (1624), Palm. 402; but see *Davidson v. Cooper* (1844), 13 M. & W. 343;

12 L. J. Ex. 467.

(*y*) *Falmouth v. Roberts* (1842), 9 M. & W. 469.

(*z*) 45 & 46 Vict. c. 61.

“(2.) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor’s assent.”

Acknowledgments Saving the Statute of Limitations.



[96.]

TANNER *v.* SMART. (1827)

[6 B. & C. 603; 9 D. & R. 549.]

21 Jac. 1,
c. 16.

In 1816 Smart gave Tanner his promissory note for 160*l.* In 1819 Tanner showed it him, and delicately suggested a settlement. Smart said frankly, “*I can’t pay the debt at present, but I will pay it as soon as I can.*” Five years slipped by, and Tanner brought an action on the note, to which Smart pleaded *actio non accredit infra sex annos*,—in other words, pleaded the Statute of Limitations. In reply to that defence, Tanner proved that only five years had elapsed since Smart had spoken the afore-said words. This, however, was considered to be insufficient, in the absence of proof of the defendant’s inability to pay.

Effect of
part pay-
ment or
acknow-
ledgment.

If I allow six years to pass without making my simple contract debtor pay me what he owes, my remedy against him is barred by the Statute of Limitations. But let me consider whether he has not perchance done something in his guilelessness to interrupt the operation of that statute. There are two ways in which the debt may have been revived.

(1.) By *part payment*, or payment of interest (*a*); and

(2.) By *acknowledgment written and signed* (*b*).

(*a*) See *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 493; 41 L. J. Q. B. 187; *Burn v. Boulton* (1846), 2 C. B. 476; 15 L. J. C. P. 97;

Maber v. Maber (1867), L. R. 2 Ex. 153.

(*b*) 9 Geo. IV. c. 14, s. 1; and 19 & 20 Vict. c. 97, s. 13.

But the part payment or acknowledgment must be of such a nature as not to be inconsistent with an *implied promise to pay* the whole debt claimed (*c*). A *refusal to pay* (for instance, where the debtor said, “*I know that I owe the money ; but the bill I give is on a threepenny receipt stamp, and I will never pay it,*”) is not good enough (*d*) ; and when there is a *conditional promise*, the creditor must prove the performance of the condition (*e*).

Promise to pay must be capable of being implied.

In *Green v. Humphreys* (*f*) the letter relied on as taking the debt out of the statute contained the following passage:—“I thank you for your very kind intention to give up the rent of Tyn-y-Burwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full.” It was held that this would not do for the purpose. “It seems to me,” said Bowen, L. J., “that, although there is here an acknowledgment of a debt in a sense, there is not a clear acknowledgment of a debt in such a way as to raise the implication of a promise to pay, but, on the contrary, only in such a way as to exclude the idea of a promise to pay, and to imply that the writer did not undertake to pay.” “I think,” said Fry, L. J., “that the words of the letter which have been referred to may be fairly paraphrased in this way, ‘I thank you for your very kind intention to let my wife receive the rents of her estate after next Christmas, but your kindness is apparent and not real, for by next Christmas the debt to satisfy which you have been stopping her rents will have been fully satisfied in some manner or another.’ That appears to me to be the best paraphrase which I can give to the sentence in question when I regard the surrounding circumstances of the case, and in that I find no acknowledgment that a debt is due from the writer.”

The mere sending of an account to a debtor appropriating money of the debtor, over which the creditor has control, to his debt, and from which appropriation the debtor does not dissent, does not amount to an “acknowledgment” by the debtor within the meaning of the statute (*g*).

Non-dissent not equivalent to acknowledgment.

An “acknowledgment” or promise to pay, if contained in a letter written “*without prejudice*,” does not avail to take the case out of the statute (*h*).

(*c*) *Smith v. Thorne* (1852), 18 Q. B. 134 ; 21 L. J. Q. B. 199 ; *Skeet v. Lindsay* (1877), 2 Ex. D. 314 ; 46 L. J. Ex. 249 ; *Quincey v. Sharp* (1876), 1 Ex. D. 72 ; 45 L. J. Ex. 317.

(*d*) *A'Court v. Cross* (1825), 3 Bing. 328 ; 11 Moore, 198 ; and see *Humphreys v. Jones* (1815), 14 M. & W. 1 ; 14 L. J. Ex. 251.

(*e*) *Meyerhoff v. Froehlich* (1878),

4 C. P. D. 63 ; 48 L. J. C. P. 43 ; *Nichols v. Regent's Canal Co.* (1894), 63 L. J. Q. B. 641 ; 71 L. T. 249, 836.

(*f*) (1881), 26 Ch. D. 474 ; 53 L. J. Ch. 625.

(*g*) *In re McHenry*, [1894] 3 Ch. 290 ; 71 L. T. 146.

(*h*) *In re River Steamboat Co.* (1871), L. R. 6 Ch. 822 ; 25 L. T. 319.

An acknowledgment *since action brought* is not sufficient (*i*); nor is an acknowledgment *to a stranger*, for it must be to the creditor or his agent, to some one who is entitled to receive payment of the debt (*k*). Thus, in an action by the indorsees against the maker of a promissory note, after the indorsement and within six years of the commencement of the action, the defendant had made a payment on account of the note *to the payee*, who had no authority to receive the money on behalf of the plaintiffs; it was held that such payment was not sufficient to take the case out of the statute (*l*).

When
statute
begins to
run.

Sale on
credit.

Promissory
note pay-
able on
demand.

The statute commences to run from *the time when the cause of action first accrues* (*m*). Thus, when goods are sold on credit, the six years are counted, not from the date of the sale, but from the time when the credit expires (*n*). In the case, however, of a promissory note payable on demand, the statute begins to run at once (*o*). Where a sum of money is payable by instalments, and there is an agreement between the debtor and the creditor that, on non-payment of any one of such instalments, the whole shall become due, the statute begins to run from the first default (*p*).

The statute does not commence to run in favour of a person whilst he is beyond seas, notwithstanding that the action is one in which leave to serve the writ out of the jurisdiction could have been obtained under Order XI. of the R. S. C. 1883 (*q*).

Principal,
surety,
and co-
sureties.

In cases between principal and surety, the statute begins to run against the latter from the time of his first payment in ease of the principal. But, as between one co-surety and another, the statute does not begin to run against the surety until he has paid more than

(*i*) *Bateman v. Pinder* (1842), 3 Q. B. 574; 2 G. & D. 790; overruling *Yea v. Fouraker* (1760), 2 Bun. 1099; *Thornton v. Illingworth* (1824), 2 B. & C. 824; 4 D. & R. 525.

(*k*) See *Grenfell v. Girdlestone* (1837), 2 Y. & C. 662; *Howcutt v. Bonser* (1849), 3 Ex. 491; 18 L. J. Ex. 262; *Haydon v. Williams* (1830), 7 Bing. 163; 4 M. & P. 811; *Godwin v. Culley* (1859), 4 H. & N. 373; *Stamford Banking Co. v. Smith*, [1892] 1 Q. B. 765; 61 L. J. Q. B. 405.

(*l*) *Stamford Banking Co. v. Smith*, *supra*.

(*m*) *Hemp v. Garland* (1843), 4 Q. B. 519; 12 L. J. Q. B. 134; *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206; 40 L. J. C. P. 141; and *Miller v. Dell*, [1891] 1 Q. B. 468; 60 L. J. Q. B. 404.

(*n*) *Helps v. Winterbottom* (1831), 2 B. & Ad. 431.

(*o*) *Norton v. Ellam* (1837), 2 M. & W. 461; 1 Jur. 433.

(*p*) *Hemp v. Garland*, *supra*, followed in *Reeves v. Butcher*, [1891] 2 Q. B. 509; 60 L. J. Q. B. 619.

(*q*) *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352; 63 L. J. Q. B. 621; where it was held that the statute does not commence to run in favour of the ambassador of a foreign state whilst he is accredited to this country or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country. See, also, 4 & 5 Anne, c. 3, s. 19 (*Ruffhead*, 4 Anne, c. 16); 7 Anne, c. 12, s. 3; and *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94.

his proportion of the debt for which he and his co-surety are jointly liable (*r*).

In the case of a contract of *indemnity*, the statute does not begin to run until the lapse of six years from the actual damnification (*s*). And, accordingly, where the defendant had obtained from the plaintiff the loan of his acceptance for 40*l.* payable forty days after date, it was held that the statute began to run from the time the bill was paid by the plaintiff, and not from the time it became due (*t*).

In the recent case of *Beck v. Pierce* (*u*), it was held that the Statute of Limitations runs in favour of a husband who is sued for the ante-nuptial debts of his wife from the time when such debts accrued against her, and not from the date of the marriage.

Where work is done under a general contract, the cause of action accrues, and the statute begins to run so soon as the work is done (*x*). But where work is done on the terms that it is to be paid for out of a particular fund, the statute does not begin to run until the fund in question has come to the hands of the defendant (*y*).

Notice by a creditor of his claim in answer to advertisements by an executor under 22 & 23 Vict. c. 35, s. 29, does not prevent the Statute of Limitations from running (*z*).

Where money is *deposited* with a person for safe custody, and not by way of loan, as no right of action arises until demand for its return is made, the statute does not begin to run until such demand (*a*).

Persons under the disability of *infancy*, *coverture* (*b*), *insanity*, or *absence beyond seas* (*c*), have *six years' grace* in which to bring their action after the disability has ceased (*d*); but, if the statute has once begun to run, no subsequent disability will suspend its operation (*e*).

(*r*) *Davies v. Humphreys* (1840), 6 M. & W. 153; 4 Jur. 250. But see *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; 68 L. T. 753.

(*s*) *Collinge v. Heywood* (1839), 9 A. & E. 633; 1 P. & D. 502; and *Huntley v. Sanderson* (1833), 1 C. & M. 467; 3 Tyr. 469.

(*t*) *Reynolds v. Doyle* (1840), 1 M. & G. 753; 2 Scott, N. R. 45.

(*u*) (1890), 23 Q. B. D. 316; 58 L. J. Q. B. 516.

(*x*) *Emery v. Day* (1834), 1 C. M. & R. 215; 4 Tyr. 695.

(*y*) *Re Kensington Station Act* (1875), L. R. 20 Eq. 197; 32 L. T. 183.

(*z*) *In re Stephens* (1890), 43 Ch. D. 39; 59 L. J. Ch. 109.

(*a*) *In re Tidd*, [1893] 3 Ch. 154; 62 L. J. Ch. 915; *Atkinson v. Bradford Third Equitable Building Society* (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360.

(*b*) See, however, the new Act (45 & 46 Vict. c. 75) as to this disability.

(*c*) See 21 Jac. I. c. 16, s. 7; and *Musurus Bey v. Gadban*, *supra*.

(*d*) 21 Jac. I. c. 16, s. 7; and see 19 & 20 Vict. c. 97, s. 10.

(*e*) *Homfray v. Scroope* (1849), 13 Q. B. 509; and *Rhodes v. Smethurst* (1840), 6 M. & W. 351; 1 H. & H. 237.

Deeds. When the contract is *under seal*, the time within which the action must be brought is not six but *twenty* years (*f*). Specialty debts in India have no higher legal value than simple contract debts, the same period of limitation, viz., three years, barring the remedy for both. But it has been held that, if an action is brought in England on a bond executed in India, the English Statutes of Limitation apply, and the remedy is not barred till after the lapse of the twenty years (*g*).

Indian bond sued on in England.

Recovery of land. A recent statute provides that "no person shall make an entry or distress, or bring an action or suit, to recover any land or rent but *within twelve years* next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit, shall have first accrued to the person making or bringing the same" (*h*). The usual disabilities are privileged, but thirty years is the utmost limit allowed, notwithstanding the existence of one of them during the whole period. By sect. 7 of the same Act a mortgagor is barred at the end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment. See also 3 & 4 Will. IV. c. 27.

Trustees. As to how far trustees are affected by the Statute of Limitations, see sect. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59); and *In re Page, Jones v. Morgan*, [1893] 1 Ch. 304; 62 L. J. Ch. 592; *In re Gurney, Mason v. Mercer*, [1893] 1 Ch. 590; 68 L. T. 289; *Thorne v. Heard*, [1893] 3 Ch. 530; 62 L. J. Ch. 1010; *Soar v. Ashwell*, [1893] 2 Q. B. 390; 69 L. T. 585.

(*f*) 3 & 4 Will. IV. c. 42, s. 3.

(*g*) *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 429; 49 L. J. C. P. 781.

(*h*) 37 & 38 Vict. c. 57, s. 1. See *Lyell v. Kennedy* (1889), 14 App.

Cas. 437; 59 L. J. Q. B. 268; *In re Davis, Evans v. Moore*, [1891] 3 Ch. 119; 61 L. J. Ch. 85; *Warren v. Murray*, [1894] 2 Q. B. 648; 64 L. J. Q. B. 42.

*Acknowledgment by Joint Contractor, &c.*WHITCOMB *v.* WHITING. (1781)

[97.]

[2 DOUGL. 652.]

Whiting and Jones made a joint and several promissory note, which in the course of time came into the hands of the plaintiff. Eight or ten years after the day on which it was made, the plaintiff sued Whiting, who had long ago forgotten his little undertaking. "Yes," said Whiting, "that certainly must be my signature, and, now you come to mention it, I *do* remember something about a promissory note. But, you see, the date of that note is more than six years ago; so I have the law of you." "That's all very fine, Mr. Whiting," replied the holder, "but Mr. Jones, the gentleman whose name is with yours on this bit of paper, has paid interest on it within the last six years; and that takes it out of the statute *as against you as well as against him.*"

And so it proved. "Payment by one," said my Lord Mansfield, "is payment for all, the one acting virtually as agent for the rest." "The defendant," said Willes, J., "has had the advantage of the partial payment, and therefore must be bound by it."

By 9 Geo. IV. c. 14, partly, and by 19 & 20 Vict. c. 97, s. 14, completely, the doctrine of this case was altered; and a Mr. Whiting of 1895 would not be prejudiced by the payment or other acknowledgment of a joint contractor, but would be able to shelter himself behind the Statute of Limitations.

In a recent case (*i*), in which the question was whether one of two partners must be presumed, in the absence of proof to the contrary, to have authority to make a payment on account of a debt due by the firm, so as to take the debt out of the Statute of Limitations as

Godwin *v.*
Parton.

(*i*) Godwin *v.* Parton (1880), 41 L. T. 91. See also *In re Wolmer-* shausen (1880), 62 L. T. 511; 38 W. R. 537.

against the other,—held, that he must—Lush, J., said: “The cases on the subject, which, of course, vary in their circumstances, are no guide to the decision of this or of any other case, except so far as they develop the principle which ought to be applied. They lay down the following conditions as necessary to constitute a part payment so as to prevent the operation of the statute.

“*First*, the payment must be shown to have been a payment of part, as part, of a larger sum; a payment which, though not in fact sufficient to cover the demand, was made on the supposition that it was sufficient, or which was accompanied with expressions or circumstances showing that the debtor did not intend even to pay more, will not suffice.

“*Secondly*, the payment must have been made on account of, or must, with the assent of the debtor, have been appropriated to the debt sought to be recovered.

“*Thirdly*, since the Mercantile Amendment Act (19 & 20 Vict. c. 97), payment by one of two joint debtors, though professedly made on behalf of both, will not prevent the statute running in favour of the other, unless it appears that he either authorised or adopted it as a payment by him as well as by his co-debtor.”

In *Watson v. Woodman* (*k*), it was held that a payment by one of a firm of partners will renew the liability of all the others, by reason of the agency of a partner to act for the firm: but that a dissolution revokes the agency, and a subsequent payment is inoperative to charge a former partner.

Discharge of Servants.

[98.]

TURNER *v.* MASON. (1845)

[14 M. & W. 112.]

Turner was housemaid in the defendant's service. Her mother became ill and likely to die, and Turner asked her master's permission to go and see her. Mason refused it; so the girl went without it. For this disobedience Mason

(*k*) (1875), L. R. 20 Eq. 721; 45 L. J. Ch. 57. See, however, *In re* Tucker, [1894] 3 Ch. 429; 63 L. J. Ch. 737.

dismissed her, and she now brought an action for wrongful dismissal, urging that it was a moral duty to go and visit a dying mother. Judgment, however, was given for the defendant, on the ground that the girl had been guilty of *wilful disobedience*, for which her master had a right to dismiss her.

Similarly, a master has been held to be justified in dismissing a servant where a farm servant refused to work at dinner time (*l*), or refused to work during harvest without beer (*m*); where a sailor refused to work the ship except to an English port (*n*); and where the messman of a regiment refused to send up dinner (*o*). On the other hand, *a servant is entitled to disobey unlawful commands*. "If the plaintiff's wife," said Parke, B., in one case (*p*), "had been requested to work during church time [at the trade of a dyer], and had obstinately refused, that would have been to her credit." And *occasional disobedience in matters of trifling importance*, such as not answering a bell, or stopping at one hotel when told to stop at another, will not warrant a master in dismissing without notice (*q*), though, of course, he will take the earliest opportunity of terminating so unsatisfactory a connection.

In addition to the case of wilful disobedience, a servant may be discharged without wages or notice in the following cases:—

(1.) When he has been guilty of *gross moral misconduct*.

Misconduct.

Of course, morality is matter of degree and opinion; what a man of the world would treat lightly, an old maid might consider very wicked. But about some things everybody would agree. Thus, if a servant is in the habit of getting drunk (*r*), or robs his master (*s*), or tries to ravish the cook (*t*), he can be turned out of the house at once. Whether a maid-servant can be discharged for pregnancy (*u*), or a man-servant for becoming the father of a bastard (*v*), is more doubtful. It is not any excuse that the immorality was not in any way connected with the master's business, and could not prejudice

(*l*) *Spain v. Arnott* (1817), 2 Stark. 256.

(*m*) *Lilley v. Elwin* (1848), 1 Q. B. 742; 17 L. J. Q. B. 132.

(*n*) *Renno v. Bennett* (1812), 3 Q. B. 768.

(*o*) *Churchward v. Chambers* (1869), 2 F. & F. 229.

(*p*) *Jacquot v. Bourra* (1839), 7 Dowl. 348; 3 Jur. 776.

(*q*) *Callo v. Brouncker* (1831), 1

C. & P. 518.

(*r*) *Wise v. Wilson* (1845), 1 C. & K. 662.

(*s*) *Baillie v. Kell* (1838), 4 Bing. N. C. 638; 6 Scott, 379.

(*t*) *Atkin v. Acton* (1830), 4 C. & P. 208.

(*u*) *Connors v. Justice* (1862), 13 Ir. C. L. R. 451.

(*v*) *R. v. Welford* (1778), Cald. 57.

it. But the discovery of a servant's dishonesty in a previous situation is not alone sufficient ground of dismissal (*y*).

The recent case of *Pearce v. Foster* (*z*) was an action for wrongful dismissal. The defendants were general merchants and commission agents, and the plaintiff had been their confidential clerk. They dismissed him because they found that he was speculating in a wild sort of way on the Stock Exchange, and, although he had continued to discharge his duties in a thoroughly efficient manner, they did not feel that they could repose further confidence in him. It was held that the defendants were perfectly justified in having dismissed him. "If a man," said Grove, J., "goes to literary meetings, or does anything which he fairly may do in his leisure hours, that would not be anything like ground for dismissal; but a man dealing beyond his means, speculating, as it has been proved, to such an enormous extent, and employing his time in constantly finding out how he may make gains by these speculations in differences, appears to me to be a man who is totally unfit for such an employment as he undertook to carry on, and I have not the slightest doubt that a reasonable and prudent man would never have thought of employing a man in that position. . . . His conduct with regard to the matter and his secrecy—for I am of opinion that it was kept from his employers—was wholly inconsistent with the nature of the service which he was to perform, and, therefore, if it is necessary to go within the literal words used by learned judges in these cases, I think he was thereby guilty of such moral misconduct as is a good ground of discharge. I am of opinion that it was a breach of moral duty to engage himself in such speculations at such a risk, and that it was incompatible and inconsistent with his employment, and that no employer ought to be expected to keep a servant who so conducted himself. There is no evidence of it, but it would also, in my judgment, tend, and tend very much, to bring the employers' character and business into disrepute, because, if it were known that a clerk in a respectable firm, doing a large and important business, was perpetually on the Stock Exchange speculating in differences and dealing in this way, it appears to me it was calculated to bring the business into disrepute, and to seriously injure the status of his employers and their business. I have taken time to consider the case, because it appears to me to be quite a new case. There is no case which is directly in point on the subject, and therefore this is a case to some extent *prime impressionis*."

(*y*) *Andrews v. Garstin* (1861),
31 L. J. C. P. 15; 4 L. T. 539.

(*z*) (1886), 17 Q. B. D. 537; 55
L. J. Q. B. 306.

It is a good defence to an action for breach of a covenant in an apprenticeship deed by the master to keep, teach, and maintain his apprentice, that the apprentice, while in the master's service, was an habitual thief (*a*).

(2.) When he *does not give proper attention* to his master's business. Inattention.

If, for instance, a servant is never found when wanted, and often sleeps out without leave, he may be discharged (*b*); but not for a mere temporary absence producing no serious inconvenience to the master; *e. g.*, if the French teacher returns to school after the holidays a day or two after the time of reassembling, the school business not having been thereby suspended or impeded (*c*). "It is a question of fact," said Vaughan, J., in a case (*d*) where the acting manager of Covent Garden theatre brought an action for wrongful dismissal, "whether the plaintiff was so conducting himself as that it *would have been injurious to the interests of the theatre to have kept him*. If he was, I should have no difficulty in saying that it would be good ground of dismissal."

(3.) When he is *not up to his work*.

Incompetence.

"The public profession of an art," said Willes, J., in *Harmer v. Cornelius* (*e*), where a man had been engaged as a scene-painter, "is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary. It may be, that if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man that is known never to have done anything but sweep a crossing to clean or mend his watch, the employer probably would be held to have incurred all risk himself." So a clerk could not be discharged because he could not drive; he might fairly reply "*non hæc in fœdera veni*."

Illness, if permanent, is ground for dismissal; but not if merely temporary (*f*).

(4.) When he *claims to be a partner*.

Claim to be partner.

The common sense of this ground of dismissal is obvious. By claiming to be a partner the servant has put himself in a position inconsistent with that in respect of which he claims wages (*g*).

(*a*) *Learoyd v. Brook*, [1891] 1 Q. B. 431; 60 L. J. Q. B. 373.

(*b*) *Robinson v. Hindman* (1800), 3 Esp. 235. See also *Boston Deep Sea Co. v. Ansell* (1888), 39 Ch. D. 339; 59 L. T. 315.

(*c*) *Fillicul v. Armstrong* (1837), 7 A. & E. 557; 2 N. & P. 406.

(*d*) *Lacy v. Osbaldiston* (1837), 8 C. & P. 80.

(*e*) (1858), 5 C. B. N. S. 236; 28 L. J. C. P. 85.

(*f*) *Cuckson v. Stones* (1859), 1 E. & E. 248; 28 L. J. Q. B. 25.

(*g*) *Amor v. Fearon* (1839), 9 A. & E. 548; 1 P. & D. 398.

So, too, a servant may be dismissed for trying to dissuade his master's customers or clients from dealing with him (*h*).

Although the master may not have assigned any one of these reasons at the time of the dismissal, and may not even have known that such reason existed, he is not thereby precluded from relying on one of them when the servant brings his action for wrongful dismissal (*i*). But if a master condones an act of misconduct which would have justified him in discharging his servant, he cannot afterwards discharge him for the same act (*k*).

Discharged
servant's
right to
wages.

A servant discharged for an act of misconduct does not forfeit his title to *wages already accrued due*. If a man, for instance, is engaged at a salary of 50*l.* a month, there is a vested right, which cannot be affected by subsequent misconduct, to the 50*l.* at the end of each month (*l*). The terms of the hiring, however, may have disturbed this right (*m*). As to wages accruing but not yet accrued due, a servant discharged for misconduct cannot recover anything for the portion of the term he has served.

Notice.

A word may be said as to the notice which servants are entitled to. If the hiring is a general one, it is presumed to be for a year, and the servant cannot be dismissed (except, of course, for misconduct) till the year has expired (*n*). Custom and special circumstances, however, may rebut this presumption. Thus, if the wages are payable weekly, it may be found a weekly hiring, and a week's notice is sufficient (*o*). A clerk can be discharged with three months' notice, and a menial servant with one. The term "menial servant" has been held to include a head gardener residing in a detached house in his master's grounds (*p*), and a huntsman (*q*); but not a governess (*r*). In the case of an advertising agent, a month's notice was found to be sufficient (*s*). In *Vibert v. Eastern Telegraph Co.* (*t*), the plaintiff was a stationery clerk in a telegraph office at a salary of 135*l.*, payable fortnightly. On its being left to the jury to say what was a reasonable notice to a person in his

(*h*) *Mercer v. Whall* (1845), 5 Q. B. 447; 14 L. J. Q. B. 267.

(*i*) *Ridgway v. Hungerford Market Co.* (1835), 3 A. & E. 171; 4 N. & M. 797.

(*k*) Per Blackburn, J., in *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(*l*) *Button v. Thompson* (1869), L. R. 4 C. P. 330; 38 L. J. C. P. 225.

(*m*) See *Walsh v. Walley* (1874), L. R. 9 Q. B. 367; 43 L. J. Q. B. 102.

(*n*) *Buckingham v. Surrey Canal Co.*, W. N. (1882), p. 104.

(*o*) *Baxter v. Nurse* (1844), 6 M. & G. 935; 13 L. J. C. P. 82.

(*p*) *Nowlan v. Ablett* (1835), 2 C. M. & R. 54; 5 Tyr. 709.

(*q*) *Nicholl v. Greaves* (1864), 17 C. B. N. S. 27; 33 L. J. C. P. 259.

(*r*) *Todd v. Kerich* (1852), 8 Ex. 151; 22 L. J. Ex. 1.

(*s*) *Hiscox v. Batchellor* (1867), 15 L. T. 543.

(*t*) (1883), 1 C. & E. 17.

position, they found that a month was. An indefinite hiring by piece-work cannot be considered a yearly hiring (*u*).

It is to be observed that a servant wrongfully dismissed is not to receive as a matter of course his full wages for the unexpired term. The amount is to be cut down by his chances of getting other employment, and he is expected to do his best to get such other employment (*x*). As to the measure of damages recoverable by a servant who has been wrongfully dismissed, the recent case of *Maw v. Jones* (1890), 25 Q. B. D. 107; 59 L. J. Q. B. 542, should be referred to. Must try to get other employment.

In *Gordon v. Potter* (*y*), it was held that a domestic servant (a cook accused of drunkenness) discharged without reason was entitled to the wages accruing up to the time of her discharge, and to a calendar month's wages in addition, but not to board wages for the month.

As to the master's right to bring an action against his servant for improperly quitting the service, see *Lees v. Whitcomb* (1828), 5 Bing. 34; 3 C. & P. 289; *Messiter v. Rose* (1853), 13 C. B. 162; 22 L. J. C. P. 78; and *Holmes v. Onion* (1857), 2 C. B. N. S. 790; 26 L. J. C. P. 261. As to his right to sue a third person who interrupts the relation, see *Terry v. Hutchinson*, *post*, p. 425; and *Lumley v. Gye*, *post*, p. 491. Wrongful dismissal of master.
Seduction of servant.

Contract to Marry.

ATCHINSON *v.* BAKER. (1797)

[99.]

[PEAKE, ADD. CA. 103.]

Mrs. Baker yielded to the persuasions of Mr. Atchinson, and promised to marry him. When the promise was made the plaintiff was apparently in good health, but the defendant afterwards discovered that he was suffering from an abscess, and refused to marry him. Mr. Atchin-

(*u*) *R. v. Woodhurst* (1818), 1 B. & Ald. 325.

(*x*) *Hartland v. General Exchange Bank* (1866), 11 L. T. 863;

and see *Reid v. Explosives Co.* (1887), 19 Q. B. D. 261; 56 L. J. Q. B. 68, 388.

(*y*) 1859, 1 F. & F. 644.

son brought an action for breach of promise, and the trial elicited some valuable remarks from Lord Kenyon: "If the condition of the parties is changed after the time of making the contract, it is a good cause for either party to break off the connection. Lord Mansfield has held that if, after a man has made a contract of marriage, the woman's character turns out to be different from what he had reason to think it was, he may refuse to marry her without being liable to an action, and whether the infirmity is bodily or mental, the reason is the same; it would be most mischievous to compel parties to marry who can never live happily together."

Hall v.
Wright.

Defences to
action.

In spite of the dictum just quoted, it is doubtful if a defendant can ever get out of his promise to marry by disparaging *himself*. In Hall v. Wright (z) the defendant pleaded that since his promise he had become afflicted with a dangerous bodily disease, which had occasioned frequent and severe bleeding from the lungs, and, in short, that he was totally unfit for marriage. But the judges festively told him that *perhaps the lady might like to be his widow*, and that his plea was no answer to the action. To get out of his promise the defendant should level his abuse, not at himself, but at the plaintiff. If, for example, after he has given his promise he discovers (and evidence of general reputation is admissible) (a) that the plaintiff is a person of poor morality (b), or if the promise was induced by the plaintiff's material misrepresentations as to her family, position, or previous life (c), he has a good defence. But it will not be a defence to show that at the time he promised to marry the plaintiff he did not know that she had been in an asylum (d), or engaged to another man (e). Most of the defences which are open to men, are open to women too; but, of course, it would be necessary for a woman defendant to fix the plaintiff with much more than mere sexual immorality before she would be entitled to disregard her promise. It will be a good defence, also, to an action against a woman that, after she had made the promise,

(z) (1858), E. B. & E. 746; 29 L. J. Q. B. 43.

(a) Foulkes v. Sellway (1800), 3 Esp. 236.

(b) Irving v. Greenwood (1824), 1 C. & P. 350.

(c) Wharton v. Lewis (1824), 1 C. & P. 529.

(d) Baker v. Cartwright (1861), 10 C. B. N. S. 124; 30 L. J. C. P. 364.

(e) Beachey v. Brown (1860), E. B. & E. 796; 29 L. J. Q. B. 105.

the plaintiff manifested a violent temper, and threatened to ill-use her (*f*).

Another defence to an action for breach of promise is that the thing was off. This exoneration from the promise may be implied from the conduct of the parties; if, for instance, there has been neither intercourse nor correspondence for a year or two, the jury would naturally draw the inference that there was an end of the engagement, even though the amorous letters were not returned (*g*).

A promise to marry need not be in writing (*h*), but the plaintiff's testimony *must be corroborated* by some other material evidence (*i*). Not long ago a woman overheard a conversation between her sister and a man, in the course of which the sister exclaimed, "*You always promised to marry me, but you never keep your word.*" Instead of indignantly denying that he had ever made such a promise, the man *remained silent*. This eavesdropper's evidence was held sufficiently "corroborative" in the action which her sister soon afterwards brought (*k*). But the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, is no evidence corroborating the plaintiff's testimony in support of such promise, within the meaning of 32 & 33 Vict. c. 68, s. 2 (*l*).

A married man may be sued on a promise to marry, if the woman did not know he was married (*m*).

An infant may sue, but cannot be sued for breach of a promise to marry. In order to bind an infant after attaining majority, there must be a new promise as distinguished from a mere ratification of the promise made during infancy (*n*).

An action for breach of promise of marriage will lie by or against the personal representatives of the party to or by whom the promise was made, provided special damage to the plaintiff's estate, contemplated by both parties at the time of the promise, is proved (*o*).

(*f*) *Leeds v. Cook* (1803), 4 Esp. 258.

(*g*) *Davis v. Bomford* (1860), 6 II. & N. 245; 30 L. J. Ex. 139.

(*h*) *Harrison v. Page* (1699), Ld. Raym. 387.

(*i*) 32 & 33 Vict. c. 68, s. 2.

(*k*) *Bessela v. Stern* (1877), 2 C. P. D. 265; 46 L. J. Ch. 467.

(*l*) *Wiedemann v. Walpole*, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762.

(*m*) *Wild v. Harris* (1819), 7 C. B. 999; 18 L. J. C. P. 297.

(*n*) See the Infants' Relief Act, 1871; *Coxhead v. Mullis* (1878), 3 C. P. D. 439; 47 L. J. C. P. 761; *Northcote v. Doughty* (1879), 4 C. P. D. 385; *Ditcham v. Worrall* (1880), 5 C. P. D. 410; 49 L. J. C. P. 688; *Holmes v. Brierley* (1888), 36 W. R. 795.

(*o*) *Chamberlain v. Williamson* (1814), 2 M. & S. 408; *Finlay v. Chirney* (1888), 20 Q. B. D. 494; 57 L. J. Q. B. 217.

Damages. Fancy damages may be given in an action for breach of promise; *e. g.*, the defendant's pecuniary position, and the girl's wounded feelings, may be taken into account (*p*). In fact, the measure of damages is rather as if the action were in tort than in contract.

The Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), consolidates the enactments relating to the marriage of British subjects outside the United Kingdom.

Suing before the Day of Performance.

[100.]

HOCHSTER *v.* DE LA TOUR. (1853)

[2 E. & B. 678; 22 L. J. Q. B. 455.]

Mr. De la Tour, meditating a visit to the Continent, engaged Hochster as his courier at 10*l.* a month, the service to commence on June 1st. Before that day came, however, Mr. De la Tour altered his mind, and told Hochster he did not want him. Without wasting words or letting the grass grow under his feet, and before June 1st, Hochster issued his writ in an action for breach of contract. For De la Tour it was argued that Hochster should have waited till June 1st before bringing his action, for that the contract could not be considered to be broken till then. It was held, however, that the contract had been sufficiently broken by De la Tour's *saying definitely that he renounced* the agreement.

Generally speaking, no action for the breach of an executory contract can be brought till the day of performance arrives. But if one of the parties *puts it out of his power* to perform it, or *expressly renounces* the contract, the day of performance need not be waited for (*q*).

(*p*) Smith *v.* Woodfine (1857), 1 331; 35 L. J. C. P. 191.
 C. B. N. S. 660; and Berry *v.* (*q*) See Synge *v.* Synge, [1894]
 Da Costa (1866), L. R. 1 C. P. 1 Q. B. 466; 63 L. J. Q. B. 202.

If a young lady agrees to marry me on May 10th, and, in defiance of that arrangement, marries Jones on April 1st, I may bring an action against her as soon as I like after April 1st, although it is quite possible that before May 10th comes she may be a widow and quite at my service (*r*).

Putting it out of power to perform.

So, too, of an *express renunciation*. A few years ago a man told his girl that, though he could not do so immediately, he *would marry her directly his father died*. Soon afterwards he repented of this promise, and, in the lifetime of his father, told the young lady frankly that he retracted his promise, and did not intend ever to marry her. The judges, following *Hochster v. De la Tour*, decided that the contract was broken immediately on the defendant's renouncing it in the way he did (*s*). The renunciation, however, to entitle the plaintiff to sue, must be precise and clear (*t*).

Distinct repudiation.

In an action for not accepting, or for not delivering, goods according to contract, it often becomes a practical question whether a partial breach by one party exonerates the other from further performance. The cases on this subject are not consistent, and it becomes a matter of considerable difficulty to ascertain precisely the principles by which the Court is guided in deciding disputes of this nature. And the difficulty is not removed by the Sale of Goods Act, 1893 (*u*), sect. 31 (2), which provides that "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." In *Simpson v. Crippin* (*v*), where goods were to be delivered by the defendant to the plaintiff in twelve equal monthly parcels, it was held that the refusal, only, of

Exoneration by breach.

(*r*) *Short v. Stone* (1846), 1 Q. B. 371; 15 L. J. Q. B. 143.

(*s*) *Frost v. Knight* (1872), L. R. 7 Ex. 111; 41 L. J. Ex. 78; and see *Cherry v. Thompson* (1872), L. R. 7 Q. B. 573; and *Roper v. Johnson* (1873), L. R. 8 C. P. 167; 42 L. J. C. P. 65.

(*t*) See *Avery v. Bowden* (1855), 6 E. & B. 962; 26 L. J. Q. B. 3. In *Johnstone v. Milling* (1886), 16 Q. B. D. 469; 55 L. J. Q. B. 162, it was "*quered*" whether the doctrine of the leading case as to

anticipatory breach of contract applies to a covenant in a lease containing many covenants, or to any case where upon a refusal by one party to perform a particular covenant the other cannot put an end to the contract in its entirety.

(*u*) 56 & 57 Vict. c. 71.

(*v*) (1872), L. R. 8 Q. B. 14; 42 L. J. Q. B. 28, where *Hoare v. Rennie* (1859), 5 H. & N. 19; 29 L. J. Ex. 73, was not followed; and see *Honck v. Muller* (1881), 7 Q. B. D. 92; 50 L. J. Q. B. 529.

the plaintiff to accept the first parcel did not exonerate the defendant from delivering the remaining parcels. And in *Freeth v. Burr* (*y*), where the delivery was to be by two equal parcels, the defendant was held not to be released from the delivery of the second parcel by the plaintiff having refused to pay for the first in accordance with the contract. The true question, perhaps, in each case is *whether the conduct of the one party amounts or not to an intimation of intention to abandon and altogether refuse performance* (*z*). In America the law appears to be fairly settled in accordance with the decisions in *Hoare v. Rennie* and *Honck v. Muller* rather than those of *Simpson v. Crippin* and *Freeth v. Burr*. The judgments in *Norrington v. Wright* (*a*), decided by the Supreme Court of the United States, contain an exhaustive and learned discussion of the English decisions, and are well worthy of attentive perusal.

(*y*) (1874), L. R. 9 C. P. 208; 43 L. J. C. P. 91.

(*z*) *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Ca. 434; 53 L. J. Q. B. 497. See Benj. on Sale (4th ed.), pp. 584—592.

(*a*) (1885), 8 Davis (115 U. S.), 189; followed in *Cleveland Rolling Mills v. Rhodes* (1886), 14 Davis (121 U. S.), 255; and *Pope v. Porter* (1886), 102 N. Y. 366. See Pollock on Contracts (5th ed.), p. 257.

DAMAGES.

Measure of Damages in Contract.

HADLEY *v.* BAXENDALE. (1854)

[101.]

[9 EXCH. 341; 23 L. J. Ex. 179.]

Messrs. Hadley & Co. were millers at Gloucester, and worked their mills by a steam engine. In May, 1853, the crank shaft of the engine broke, and their mills suddenly came to a standstill. With a view to remedying the disaster, they communicated immediately with Messrs. Joyce & Co., engineers, of Greenwich, and settled to send them the broken shaft that it might form the pattern for a new one. They then sent a servant to the office of the defendants, the well-known firm of carriers trading under the name of "Pickford & Co.," to arrange for the carriage of the broken shaft. The servant found a clerk at the office, and that gentleman informed him that, if sent any day before twelve o'clock, the shaft would be delivered the next day at Greenwich. On the following day, accordingly, before noon, the shaft was received by the defendants for the purpose of being conveyed to Greenwich, and 2*l.* 4*s.* was paid for its carriage for the whole distance. It happened, however, through the negligence of the defendants, that the shaft was *not* delivered the next day at Greenwich; and the consequence was that Hadley & Co. did not get the new shaft till several days after they other-

wise would have done, the mills in the meantime remaining silent and idle, to the not small pecuniary loss of their proprietors.

It was for the loss of those profits which they would have made if the new shaft had come to them when they expected it that this action was brought; and the question was whether the damages were too remote. It was held that if the carriers had been made aware that a loss of profits would result from delay on their part, they would have been answerable. But it did not appear that they knew that the want of the shaft was the only thing which was keeping the mill idle. Therefore they were not liable.

Damages
arising
naturally.

The damages recoverable for breach of contract are those which arise naturally from the breach, or, as has been said, are such as *may be reasonably supposed to have been in the contemplation of the parties at the time the contract was made as the probable result of a breach of it*. Baron Martin (*a*), however, objected to the latter test of damage, on the ground that parties, when they make a contract, contemplate *fulfilling* and not *breaking* it.

Three
great rules.

Three rules are generally considered to be deducible from the leading case of *Hadley v. Baxendale* (*b*).

(1.) *Damages which may fairly be deemed such as would directly and naturally* (*c*) *arise from a breach of the contract, in the usual course of things, are recoverable.*

Thus, in an action (*d*) for not accepting goods sold, or for not delivering them, the measure of damages is *the difference between the contract price and the market price of similar goods at the time when they ought to have been accepted or delivered*. And where the contract is to deliver goods in *specified quantities at specified periods* (*e*), as each period arrives, if no delivery or only a partial delivery takes place, the damages will be the difference between the contract price

(*a*) *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. at p. 100; 39 L. J. Ex. 41.

(*b*) The measure of damages on the breach of a contract for the sale of goods is dealt with in sects. 50–54 of the Sale of Goods Act, 1893, 53 & 57 Viet. c. 71.

(*c*) *McMahon v. Field* (1881), 7 Q. B. D. 591; 50 L. J. Q. B. 852;

Welch v. Anderson (1892), 61 L. J. Q. B. 167; 66 L. T. 412.

(*d*) *Valpy v. Oakley* (1851), 16 Q. B. 941; 20 L. J. Q. B. 380; *Ogle v. Vane* (1868), L. R. 2 Q. B. 275; 3 Q. B. 272; 37 L. J. Q. B. 77.

(*e*) *Brown v. Muller* (1872), L. R. 7 Ex. 319; 41 L. J. Ex. 214.

and the market price on that day of the quantity which ought to have been then supplied. In a recent case (*f*) a cow was sold with a warranty that it was free from disease. As a matter of fact, it had the foot-and-mouth disease, and infected a number of other cows belonging to the purchaser. All the cows died, and the vendor was held responsible for the entire loss, on the ground that he could never have supposed that the cow he sold was intended for a life of solitary confinement. He must have known that the breach of warranty would, in all probability, lead to the result which actually followed.

Diseased cow warranted free from disease.

So, too, any increased cost to which a person is put from the necessity of doing himself what he had contracted that someone else should do for him is recoverable, if what he does is the fair and reasonable thing to do under the circumstances. On this point *Le Blanche v. London and North Western Railway Co.* may be consulted (*g*).

(2.) *Damages, not arising naturally, but from circumstances peculiar to the special case, are not recoverable unless the special circumstances were known to the person who has broken the contract.*

Special circumstances.

The leading case went off on this point. The special circumstances, although hinted at, were not so fully disclosed that the defendants were aware that the want of the shaft was the only thing which kept the mills idle. The case of *Horne v. Midland Railway Co.* (*h*), well illustrates this rule. Early in 1871 the plaintiffs contracted to supply a quantity of shoes at 4s. a pair for the use of the French army. They were to be delivered by a particular day, or they would be thrown back on the plaintiffs' hands. The plaintiffs delivered these shoes in good time at Kettering, and gave notice to the station-master there that they were under contract to deliver on that day, and that, if not so delivered, the shoes would be thrown on their hands; but no further information was given. Somehow, the shoes were not delivered in time, and, doing the best they could, the plaintiffs could not sell the rejected shoes for more than 2s. 9d. a pair, and the plaintiffs brought this action to recover from the company the difference between 4s. and 2s. 9d. on each pair. It appeared that the ordinary market price had not varied between the day on which the boots were due and

Shoes for the French army.

(*f*) *Smith v. Green* (1875), 1 C. P. D. 92; 45 L. J. C. P. 28; and see *Mullett v. Mason* (1866), L. R. 1 C. P. 559; 35 L. J. C. P. 299.

(*g*) *Autie*, p. 253.

(*h*) (1873), L. R. 7 C. P. 583; 8 C. P. 131; 42 L. J. C. P. 59; and see *Morris v. Lond. & West. Bank*

(1885), 1 C. & E. 498, which was an action to recover damages for the dishonour of a cheque through a mistake of the banker's, the consequence being that a bill discounter refused to deal any longer with the plaintiff's firm.

the day on which they were received, and it was held that, under the circumstances, the defendants were not liable for the special loss which had arisen.

Cory v.
Thames
Ironworks
Company.

In another case (*i*), this rule came under consideration in a somewhat anomalous state of circumstances, the parties not having in contemplation the same use for the article to be supplied, which was of a novel character. The defendants agreed to sell to the plaintiff the hull of a floating boom derrick and deliver it at a time fixed. They believed that the plaintiff wanted it as a coal-store, but, as a matter of fact, he intended to use it for the purpose of transshipping coals from colliers into barges. The former was the most obvious use to which such a vessel would be applied, and the defendants had no notice or knowledge of the special object for which it was purchased. The defendants being late in their delivery of the derrick to the plaintiff, were held liable for the loss of such profits as would have been made during the period of delay by the use of the vessel as a coal-store, but not for any further loss or damage that had occurred.

Special
circum-
stances
known to
party
breaking
and
damage
flowing
naturally
from
breach.

Qualifica-
tion of
third rule.

(3.) *Where the special circumstances are known to the person who breaks the contract, and the damage complained of flows naturally from the breach under those special circumstances, such special damage is recoverable.*

But this rule cannot, it seems, be received without the important qualification that (*k*) "The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with *reasonably believes that he accepts the contract with the special condition attached to it.*" And this expression of opinion was subsequently confirmed by Willes, J., in the case of *Horne v. Midland Railway Co.* (*l*), just referred to, and also by the observations of Blackburn, J., when giving judgment in the same case. That learned judge remarked, "In *Hadley v. Baxendale* it is said that, if special notice be given, the damage is recoverable, though there be no special contract, and this has been repeated in various cases; but it is noticeable that there seems to be no case where it has been held that if notice be given abnormal damages may be recovered; and I should be inclined to agree with my brother Martin that they cannot unless there be a contract. But it is not necessary to decide this question, because here, in fact, there was no such notice; the notice here given conveys full

(*i*) *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.

(*k*) Per Willes, J., in *British Columbia Saw Mill Co. v. Nettle-*

ship (1868), L. R. 3 C. P. 499; 37 L. J. C. P. 235; and see *Hawes v. S. E. Ry. Co.* (1881), 54 L. J. Q. B. 179; 52 L. T. 514.

(*l*) *Supra.*

information that the day is of consequence, and that the goods should be delivered on the 3rd of February if the defendants could, from which a contract of sale on which there was a profit might be inferred; but there was no notice that the defendants would have to pay the amount of loss claimed. Therefore, it is not necessary to decide whether the dictum in *Hadley v. Baxendale* is law, though I confess that at present I think it a mistake."

Take the case of a defendant who has no option of refusing the contract, and is not at liberty to require a higher rate of remuneration; can it be contended that the mere fact that he proceeded in the contract with knowledge of the special circumstances in itself gives rise to an undertaking to incur a liability for special damages? As, for example, where a railway passenger, on buying his ticket, informs the clerk of some particular loss that would arise on his being late.

Under the circumstances last supposed the learned author of *Mayne on Damages* says (*m*) that "Even if there were an express contract by the defendant to pay for special damages, it might be questioned whether such a contract would not be void for want of consideration."

There is, however, a case (*n*) which deserves careful attention, and which at first sight appears to militate against the views that have just been expressed. An action was brought by a cattle-spice manufacturer against a railway company for not delivering spice samples, &c., which the plaintiff had been exhibiting at a cattle-show at Bedford, in time for another show at Newcastle-on-Tyne. The plaintiff had not distinctly informed the defendants that the samples were intended for exhibition at the Newcastle show, but he had addressed them, "The Show Ground, Newcastle-on-Tyne," and had stated that they must be there on Monday certain, and there could really have been no doubt as to what the man's purpose was. The plaintiff was held entitled to recover damages for the loss which he had sustained by reason of the delay. The learned author to whom reference has just been made observes on this case (*o*): "Notwithstanding some expressions in the judgment, it appears that the case really came under the first rule in *Hadley v. Baxendale*, and not under the third. Goods are consigned with a contract that they are to be delivered at a particular place on a particular day. The contract is broken. What are the damages? They are the damages naturally arising from the non-arrival of the particular

Spice
samples
too late
for show.

(*m*) 5th ed. p. 41.

(*n*) *Simpson v. L. & N. W. Ry. Co.* (1876), 1 Q. B. D. 274; 45 L. J. Q. B. 182. See also *Schulze v.*

G. E. Ry. Co. (1887), 19 Q. B. D. 30; 56 L. J. Q. B. 442.

(*o*) *Mayne on Damages*, 5th ed. pp. 37, 38.

sort of goods. The evidence as to knowledge simply went to show that the defendants knew what sort of goods they were. A carrier will be liable to different damages according as he delays a basket of fish or a basket of coals, for the simple reason that delay frustrates the object of sending the fish, but not that of sending the coals. Here the plaintiff claimed no special damages, but merely general damages for the failure of his object in sending the goods."

Landlord
and tenant.

Where a lessee has covenanted to leave the premises in repair at the end of the term, the rule as to the measure of damages, on breach of the covenant, is that the damages are such a sum as it will cost to put the premises into the state of repair in which the lessee was bound to leave them (*p*). Under a covenant to keep a house in "good tenable repair," the tenant's obligation is to keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it (*q*).

Interest.

At common law, the creditor, as a general rule, is not entitled to interest. "It is now established, as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or other circumstances" (*r*). There is no implied promise to pay interest on a sale of goods *simpliciter*, and it makes no difference that the sale is on credit, or that a particular date is fixed for payment (*s*). But a contract to pay interest on the price will be implied when the goods are to be paid for by bill, which is not given, and from the date when the bill would have matured (*t*).

By statute, interest is recoverable in certain cases. It is enacted by 3 & 4 Will. IV. c. 42, s. 28, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they

(*p*) See *Joyner v. Weeks*, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510, where it was held that this rule is not affected by the fact that before the expiration of the term the lessor has relet the premises on the expiration of the term to a third person who has covenanted to alter and rebuild the premises. And see *Henderson v. Thorne*, [1893] 2 Q. B. 164; 62 L. J. Q. B. 586.

(*q*) See *Proudfoot v. Hart* (1890), 25 Q. B. D. 42; 59 L. J. Q. B. 389.

(*r*) Per Abbott, C.J., in *Higgins v. Sargent* (1823), 2 B. & C. 348. And see per Hall, V.-C., in *Hill v. South Staffordshire Ry. Co.* (1874), L. R. 18 Eq. 167; 43 L. J. Ch. 556; and per Lindley, L. J., in *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, [1892] 1 Ch. 140; 61 L. J. Ch. 294.

(*s*) *Gordon v. Swan* (1810), 2 Camp. 429; 12 East, 419; *Calton v. Bragg* (1812), 15 East, 223.

(*t*) *Marshall v. Poole* (1810), 13 East, 98; *Farr v. Ward* (1837), 3 M. & W. 25.

shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment (*u*). Provided that interest shall be payable in all cases in which it is now payable by law." And sect. 29 provides that "The jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give *damages in the nature of interest* over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above all money recoverable in all actions on policies of insurance made after the passing of this Act" (*x*).

Other cases on "measure of damages" which may be consulted are *Hammond v. Bussey* (1887), 20 Q. B. D. 79; 57 L. J. Q. B. 58; *Wigsell v. School for Indigent Blind* (1882), 8 Q. B. D. 357; 51 L. J. Q. B. 330; *Thol v. Henderson* (1881), 8 Q. B. D. 457; *Lilley v. Doubleday* (1881), 7 Q. B. D. 510; 51 L. J. Q. B. 310; *Ashdown v. Ingamells* (1880), 5 Ex. D. 280; 43 L. T. 424; *Jenkins v. Jones* (1882), 9 Q. B. D. 128; 51 L. J. Q. B. 438; *Baldwin v. L. C. & D. Ry. Co.* (1882), 9 Q. B. D. 582; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797; 52 L. J. Q. B. 538; *Meek v. Wendt* (1888), 21 Q. B. D. 126; 59 L. T. 558; *Grébert-Bognis v. Nugent* (1885), 15 Q. B. D. 85; 54 L. J. Q. B. 511; *The Notting Hill* (1884), 9 P. D. 105; 53 L. J. P. 56; *Skinner v. City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882; 54 L. J. Q. B. 437; *Whitham v. Kershaw* (1885), 16 Q. B. D. 613; 54 L. T. 124; *Kiddle v. Lovett* (1885), 16 Q. B. D. 605; 34 W. R. 518; and *Tredegar Iron and Coal Co. v. Gielgud* (1883), 1 C. & E. 27.

(*u*) See *Harper v. Williams* (1843), 4 Q. B. 219, 224; 12 L. J. Q. B. 227; *Edwards v. G. W. Ry. Co.* (1851), 11 C. B. 588; 21 L. J. C. P. 72; *Hill v. South Staffordshire Ry. Co.* (1874), 18 Eq. 151; 43 L. J. Ch. 556; and *L. C. & D. Ry. Co. v. S. E. Ry. Co.*, [1892] 1 Ch. 120; 61 L. J. Ch. 291, as to the meaning of the word "certain." And see *Harper v. Williams*, *supra*; *Mowatt v. Londesborough* (1854), 4 E. & B. 1; 23 L. J. Q. B. 38;

and *Rhymney Ry. Co. v. Rhymney Iron Co.* (1890), 25 Q. B. D. 146; 59 L. J. Q. B. 414, as to what is a sufficient "demand."

(*x*) This statute was said by Thesiger, L. J., in *Webster v. British Empire Assurance Co.* (1880), 15 Ch. D. at p. 178; 49 L. J. Ch. 769, to be merely declaratory of the common law. See generally on the question of interest, *Mayne on Damages*, 5th ed., Chap. IV. pp. 156 *et seq.*

Penalties and Liquidated Damages.

[102.]

KEMBLE v. FARREN. (1829)

[6 BING. 141 ; 3 M. & P. 425.]

Something more than half a century ago an actor and a manager entered into an agreement. The actor on his part undertook to act as principal comedian at the manager's theatre (Covent Garden) for four seasons, and in all things to conform to the regulations of the theatre; while the manager agreed to pay the actor 3*l.* 6*s.* 8*d.* a night, and to allow him a benefit once every season. And the agreement contained this clause, "that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof, or any stipulation therein contained*, such party should pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*"

For some reason or other—it does not matter what—during the second season the actor refused to act, and the manager now went to law to recover the whole 1,000*l.* mentioned in the agreement, although he was quite prepared to admit that he had not sustained damage to a greater extent than 750*l.*

The manager, however, did not succeed, for the Court said that it could never be taken to be the intention of the parties that the whole 1,000*l.* should instantly become payable on the happening of any breach, however trifling (*y*).

Question
of inten-
tion.

It is not always, however, that a Court will interfere in this way and pronounce what the parties—who ought to know best—call

(*y*) Sec 8 & 9 Will. III. c. 11, s. 8.

liquidated damages to be really only a *penalty*. If the agreement, for instance, were not, as it was in *Kemble v. Farren*, one containing various stipulations of various degrees of importance, but if there were only one event upon which the money was to become payable, or if there were several events, but the damages impossible accurately to measure, then no attempt to turn liquidated damages into a mere penalty would be successful; and in such cases it would be of no consequence whether in the contract the sum to be paid in the event of breach was called "a penalty" or "liquidated damages," because the Court will look to the meaning and effect of the contract itself as disclosing the intention of the parties, and, having satisfied itself on that point, does not care much for the term they happen to have selected from Johnson's Dictionary (z). Illustrations of the unimportance of the language used may be found in the recent cases of *Catton v. Bennett* (1884), 51 L. T. 70; and *Elphinstone v. Monkland Iron Co.* (1886), 11 App. Cas. 332; 35 W. R. 17.

Only one event.
Damages impossible to measure.
Name immaterial.

About forty years ago, two London solicitors dissolved partnership, one of them covenanting not to practise during the next seven years within fifty miles of Ely Place, nor interfere with or influence any of the clients of the late co-partnership; if he in any way infringed the covenant, he was to pay 1,000*l.* "as and for liquidated damages, and not by way of penalty." On breach of this covenant, it was held that, no matter how slight the damage was, the whole 1,000*l.* had to be paid (a). "Parties," said Parke, B., "are bound by their contracts, if those contracts be clearly made. It is clear that the defendant stipulated to pay 1,000*l.* for the breach of any one of the conditions mentioned; and they are such that the damage arising from the violation of any of them cannot be exactly estimated beforehand."

Galsworthy v. Strutt.

In *Saintier v. Ferguson* (b) the facts were very similar, but the word "penalty" was used in specifying the sum to be paid, and there was only one event on which the money was to become payable. "We can only give effect," said the Court "to the contract of the parties by holding the 500*l.* to be liquidated damages, and not a mere penalty."

Saintier v. Ferguson.

In the recent case of *Barton v. Capewell Co.* (c), under an agreement for the sale of a patent, the sum of 1,400*l.* had been paid as

Barton v. Capewell Co.

(z) Per Chambre, J., in *Astley v. Weldon* (1801), 2 B. & P. 354; and see *Sparrow v. Paris* (1862), 7 H. & N. 594; 31 L. J. Ex. 137; and *Law v. Redditch Local Board*, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172.

(a) *Galsworthy v. Strutt* (1848), 1 Ex. 659; 17 L. J. Ex. 226.

(b) (1849), 7 C. B. 716; 18 L. J. C. P. 217.

(c) (1893), 68 L. T. 857; 5 R. 371.

part of the purchase-money; the balance was to be paid in three equal instalments at certain specified times, and in case of default by the purchaser in paying any of the instalments, "all payments made shall be absolutely forfeited to the vendor as and by way of liquidated damages." Default having been made in paying the first instalment, the Court held that the vendor could not retain the 1,400*l.*, as that sum was in reality a penalty and not liquidated damages.

Election on breach.

It is to be observed that when a covenant is secured by a penalty, the obligee on breach has an election. Either he may go for the penalty and be satisfied with that, or he may sue on the covenant and recover more or less according to his merits. In the former case, the contract is rescinded, and the penalty becomes the debt in law (*d*).

Equitable relief.

Protector Loan Co. *v.* Grice.

On the subject of equitable relief against penalties, the reader is referred to *Peachy v. Somerset* (*e*), *Sloman v. Walter* (*f*), and the recent case of the Protector Loan Co. *v.* Grice (*g*). In the last-mentioned case it appeared that the plaintiffs had lent money to a man named Simpson, on his bond, under which repayment was to be made by instalments, *the whole of the instalments to become payable at once if default was made in the payment of any one of them*. The defendant as surety executed the bond, and, default having been made in the payment of one instalment, this action was brought for the entire balance of unpaid instalments. "The doctrine in equity," said Baggallay, L. J., "is stated by Lord Macclesfield, L. C., in *Peachy v. Duke of Somerset*: 'The true ground of relief against penalties is from the original intent of the case where the money is designed only to secure money, and the Court gives him all that he expected or desired;' but it has long been established that relief in equity is also given where the penalty is intended to secure the performance of a collateral object: *Sloman v. Walter*. Familiar instances of the relief afforded in equity may be found in those cases where a default has occurred in repayment of a loan secured by a mortgage; but where the intent is not simply to secure a sum of money, or the enjoyment of a collateral object, equity does not relieve. It may be assumed, from the relation of the parties, that they intended to carry out the terms of the agreement; it was competent to them to determine that the loan should be repayable in the manner mentioned; it was worth the while of the parties that the money should

(*d*) *Winter v. Trimmer* (1762), 1 W. Bl. 395; *Harrison v. Wright* (1811), 13 East, 343; *Holt, N. P.* C. 46, n. (7).

(*e*) (1714), 1 Stra. 447.

(*f*) (1784), 1 Bro. C. C. 418.

(*g*) (1880), 5 Q. B. D. 592; 49 L. J. Q. B. 812.

be borrowed upon the terms mentioned in the condition; and it would be an act of injustice to the lenders to give judgment for the defendant."

Other cases on the subject-matter of this note, which may advantageously be referred to, are *Thompson v. Hudson* (1869), L. R. 4 H. L. 1; 38 L. J. Ch. 431; *Reynolds v. Bridge* (1856), 6 E. & B. 528; 26 L. J. Q. B. 12; *Mercer v. Irving* (1858), E. B. & E. 563; 27 L. J. Q. B. 291; *Howard v. Woodward* (1864), 34 L. J. Ch. 47; 11 L. T. 414; *Birch v. Stephenson* (1811), 3 Taunt. 469; *Farrant v. Olmius* (1820), 3 B. & Al. 692; *Ex parte Capper* (1876), 4 Ch. D. 724; 46 L. J. Bk. 6, 57; *Atkyns v. Kinnier* (1850), 4 Ex. 766; 19 L. J. Ex. 132; *Magee v. Lavell* (1874), L. R. 9 C. P. 107; 43 L. J. C. P. 131; *Lea v. Whitaker* (1872), L. R. 8 C. P. 70; 27 L. T. 676; *Sterne v. Beck* (1863), 32 L. J. Ch. 682; 1 De G. J. & S. 595; *Mexborough v. Wood* (1882), 47 L. T. 516; and last, but not least, the very important case of *Wallis v. Smith* (1882), 21 Ch. D. 243; where the judgments should be carefully perused.

Other important cases.

TORTS.

Injuria and Damnum.ASHBY *v.* WHITE. (1703)

[103.]

[LORD RAYM. 938.]

The vote of an elector at Aylesbury was rejected at the poll. As it happened, the candidates for whom the gentleman had intended to vote were elected. But in spite of his thus having sustained no actual damage, he brought an action against the returning officer, and, after much discussion, it was held that such an action could be maintained. In the course of his celebrated judgment, Holt, C.J., said, "A damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing—no, not so much as a little *diachylon*—yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

CHASEMORE *v.* RICHARDS. (1859)

[104.]

[7 H. L. C. 349; 29 L. J. Ex. 81.]

The local board of health for the town of Croydon in 1851 sank a substantial well and supplied the people of Croydon with water at the rate of 600,000 gallons a day.

But the public gain was Mr. Chasemore's loss. That gentleman was the occupier of a mill situated on the river Wandle about a mile from Croydon, and had—he and his predecessors—used the river for the last seventy years for turning his wheels. The effect of what the local board had done was to prevent an enormous quantity of water from ever reaching the Wandle or his mill. He went to law, but did not win. The judges told him that, though he was much to be sympathised with, he had no legal remedy. There was *damnum*, they said, but not *injuria*.

Injuria and damnum. These two cases pretty clearly illustrate the distinction between *injuria sine damno* and *damnum sine injuriâ*. Wherever a person has sustained what the law calls an “injury,” there he may bring an action without being under the necessity of proving special damage, because the injury itself is taken to imply damage. A banker once dishonoured the cheque of a customer who really had plenty of money in the bank, and the customer therefore brought an action against him. It was held that the action was maintainable, although the plaintiff had not sustained any loss whatever by the banker's wrongful act. There was no *damnum*, true; but there was *injuria*, and that was sufficient (*a*). So an action lies against a man who trespasses in my field, although he does me no pecuniary injury (*b*).

De minimis non curat lex. In *Ashby v. White* the defendant's counsel cited unsuccessfully the maxim *de minimis non curat lex*, contending that, even if Ashby had sustained some damage, it was of so inconsiderable a character as to be unworthy of notice.

Novelty no objection. It was also objected that there was *no precedent* for such an action; but Lord Holt replied that *if men will multiply injuries, actions must be multiplied too*.

Damnum sine injuriâ. On the other hand, it is not everything that the law regards as an injury. The most terrible wrongs may be inflicted by one man on another without legal redress being obtainable. If you are driving a flourishing trade as a schoolmaster, and I come and set up a school just opposite to yours, and the boys desert you and flock to me, there is no *injuria* here, though I may have turned schoolmaster for the express purpose of ruining you. It is *damnum sine injuriâ*, and you have no right of action against me. So, too,

(*a*) *Marzetti v. Williams* (1830), 1 B. & Ad. 415.

(*b*) See *Sears v. Lyons* (1818), 2

Stark. 317; *Nieklín v. Williams* (1854), 10 Ex. 259; 23 L. J. Ex. 335.

slander and seduction are not always actionable. See also *Metr. Asylums District Board v. Hill* (1881), 6 App. Cas. 193; 50 L. J. Q. B. 353.

Chasemore v. Richards is a case of considerable importance on the subject of watercourses. Every riparian owner is entitled to take a reasonable quantity of the water flowing in a natural stream, whether tidal and navigable or not (*c*), for his domestic or business requirements, the reasonableness depending on the circumstances of each case (*d*). When no material injury would thereby be inflicted on lower riparian owners, he may even divert or dam (*e*); but, of course, when he dams, he must not let the water all go with a rush so as to flood his neighbour's lands. And as the riparian owner has no business to take *too much* water, so neither can he *pollute* the stream; and, if he does so, it will be no excuse that others have been more foul than he has, so that his particular pollution is imperceptible (*f*). By grant or prescription, however, a riparian owner may be entitled to divert or pollute a stream (*g*).

Rights of riparian ownership.

Diverting and damming.

A prescriptive right, however, to divert or pollute a stream in a particular way or at a particular place infers no right to divert or pollute in any other way or at any other place (*h*).

In addition to the riparian owner's rights to take water *for use*, and to have it *pure*, he has a right to the stream's *natural flow* (*i*); and this is so even in the case of a stream *flowing underground* in a definite channel or tunnel (*k*). "If the channel or course underground is known, as in the case of the river Mole, it cannot be interfered with. It is otherwise when nothing is known as to the sources of supply; in that case, as no right can be acquired against the owner of the land under which the spring exists, he may do as he pleases with it" (*l*).

Purity and flow.

Under-ground streams.

(*c*) *Lyon v. Fishmongers' Co.* (1876), 1 App. Ca. 662; 46 L. J. Ch. 68. See also the recent case of *North Shore Railway v. Pion* (1889), 14 App. Ca. 612; 59 L. J. P. C. 25.

(*d*) *Sandwich v. G. N. Ry. Co.* (1878), 10 Ch. D. 707; 27 W. R. 616.

(*e*) *Nuttall v. Bracewell* (1866), L. R. 2 Ex. 1; 36 L. J. Ex. 1; *Swindon Waterworks Co. v. Wilts Canal Co.* (1875), L. R. 7 H. L. 697; 45 L. J. Ch. 638; and see *Ormerod v. Todmorden* (1883), 11 Q. B. D. 155; 52 L. J. Q. B. 445; *Kensit v. G. E. Ry. Co.* (1881), 27 Ch. D. 122; 51 L. J. Ch. 19.

(*f*) *Wood v. Waud* (1849), 3 Ex. 748; 18 L. J. Ex. 305; and see *Ballard v. Tomlinson* (1885), 29 Ch. D. 115; 54 L. J. Ch. 454; *Snow v. Whitehead* (1884), 27 Ch. D. 588; 53 L. J. Ch. 885.

(*g*) *Embrey v. Owen* (1851), 6 Ex. 353; 20 L. J. Ex. 212.

(*h*) See *McIntyre v. McGavin*, [1893] A. C. 268; 57 J. P. 548.

(*i*) See *Young v. Bankier Distillery Co.*, [1893] A. C. 691; 69 L. T. 838.

(*k*) *Holker v. Porritt* (1875), L. R. 10 Ex. 59; 44 L. J. Ex. 52. But see *Ballard v. Tomlinson*, *supra*.

(*l*) Per Pollock, C.B., in *Dudden*

Artificial streams.

The right to use an artificial stream depends on the circumstances of its creation; but it has been held that the flow of water from a drain made for agricultural improvements for twenty years does not give a right to the person through whose land it flowed to the continuance of the flow, so as to preclude the proprietor of the land drained from altering the level of his drains for the improvement of his land, and so cutting off the supply (*m*). But if an artificial stream is *permanent in its character*, a right to the uninterrupted flow of the water may be acquired (*n*), and in *Sutcliffe v. Booth* (*o*) it was held that a watercourse, though artificial, may have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream.

Percolating streams.

There is no natural right to the uninterrupted flow of percolating streams whose course is undefined and unknown (*p*). But such rights may be granted by one landowner to another (*q*).

Land supported by water.

Where the defendant, by draining his land, drained away subterranean water from under the plaintiff's land, and thereby caused it to sink, it was held that no action could be brought (*r*). But the defendant would be liable if, in drawing off subterranean water, he were to draw off water flowing in a defined surface channel (*s*).

Water supported by water.

Other important cases.

The following cases on watercourses may also be usefully referred to:—*Bealey v. Shaw* (1805), 6 East, 208; 2 Smith, 321; *Saunders v. Newman* (1818), 1 B. & Al. 258; *Wright v. Howard* (1823), 1 Sim. & Stuart, 190; *Mason v. Hill* (1832), 3 B. & Ad. 304; 2 N. & M. 747; 5 B. & Ad. 1; *Hodgkinson v. Ennor* (1863), 4 B. & S. 229; 32 L. J. Q. B. 231; *Magor v. Chadwick* (1840), 11 A. & E. 571; 3 P. & D. 367; *Whalley v. L. & Y. Ry. Co.* (1884), 13 Q. B. D. 131; 53 L. J. Q. B. 285; *Blair v. Deakin* (1887), 57 L. T. 522; 52 J. P. 327; and *Clarke v. Somersetshire Drainage Commissioners* (1888), 57 L. J. M. C. 96; 59 L. T. 670.

v. The Guardians of Clutton Union (1857), 1 H. & N. 627; 26 L. J. Ex. 146. See *Bunting v. Hicks* (1894), 70 L. T. 455; 7 R. 293.

(*m*) *Greatrex v. Hayward* (1853), 8 Ex. 291; 22 L. J. Ex. 137. And see *Brymbo Water Co. v. Lesters Lime Co.*, (1894) 8 R. 329.

(*n*) See *Arkwright v. Gell* (1839), 5 M. & W. 203; 2 H. & H. 17.

(*o*) (1863), 32 L. J. Q. B. 136; 9 Jur. N. S. 1037; and see *Roberts v. Richards* (1881), 50 L. J. Ch. 297; 44 L. T. 271.

(*p*) *Acton v. Blundell* (1843), 12 M. & W. 324; 13 L. J. Ex. 289. And see *Bradford Corporation v. Pickles*, [1895] 1 Ch. 145; 64 L. J. Ch. 101; affirmed in the House of Lords, [1895] A. C. 587.

(*q*) *Whitehead v. Parks* (1858), 2 H. & N. 870; 27 L. J. Ex. 169.

(*r*) *Popplewell v. Hodgkinson* (1869), L. R. 4 Ex. 248; 38 L. J. Ex. 126.

(*s*) *Grand Junction Canal Co. v. Shugar* (1871), L. R. 6 Ch. 483; 24 L. T. 402.

An action for a tort cannot generally be brought after his death against the representatives of the person who has committed it, because *actio personalis moritur cum persona* (t). But see 3 & 4 Will. IV. c. 42, and 9 & 10 Vict. c. 93. Death of tortfeasor.

Ancient Lights.

YATES v. JACK. (1866)

[105.]

[L. R. 1 Ch. 295; 14 L. T. 151.]

In this case the plaintiff was a merchant carrying on a large business at a warehouse in London, and he asked for an injunction restraining his opposite neighbour from erecting a building so as to obstruct his ancient lights. For the defendant it was contended that no injury would be done to the plaintiff by the new buildings, for he would still have plenty of light for his business. But it was held that, even if that were so, it did not matter; because the owner of ancient lights is entitled *not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained*. “The right conferred or recognized by the statute 2 & 3 Will. IV. c. 71,” said Lord Cranworth, L.C., “is an absolute indefeasible right to the enjoyment of the light, *without reference to the purpose for which it has been used*.”

The third section of the Prescription Act (u) says that “When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed (x) therewith for the full period of twenty years without interruption, the Section 3.

(t) See *Kirk v. Todd* (1882), 21 Ch. D. 484; 52 L. J. Ch. 224; *Bowker v. Evans* (1885), 15 Q. B. D. 565; 54 L. J. Q. B. 421.

(u) 2 & 3 Will. IV. c. 71.
(x) *Cooper v. Straker* (1888), 40 Ch. D. 21; 58 L. J. Ch. 26.

Common law prescription. right thereto shall be deemed absolute and indefeasible," unless the same was enjoyed merely by written consent. This section has recently been held not to bind the Crown, and, consequently, no right of light can be obtained under the section over land in possession of the Crown, whether held directly or through trustees (*y*). An indefeasible right, however, to the access and use of light may be gained by prescription at common law, independently of the Act (*z*).

"Without interruption." Section 4 of the Prescription Act points out the way in which the enjoyment may be effectively interrupted. Nothing is to be deemed an interruption unless it has been *submitted to for a year* after notice (*a*). *Flight v. Thomas* (*b*) is a leading case on the construction of this section. It was held in that case that an enjoyment for 19 years and 330 days, followed by an interruption of 35 days just before the commencement of the action, was sufficient to establish the right.

Open spaces. A right to unobstructed light cannot be acquired in favour of *open ground*, but only in favour of *buildings* (*c*). But the building need not be occupied or even completed internally so as to be fit for immediate habitation (*d*).

Different application of premises to be contemplated. The leading case was followed in *Moore v. Hall* (*e*), where Mellor, J., said, "I do not think the present actual condition of the premises is the measure of the amount of damage. In estimating the damages, you ought not, in my opinion, to stereotype the existing condition of the premises, but to *calculate the reasonable probabilities of a different application of them*." The dim religious light which is good enough for the smoking room will not do for the library; and there is no reason why I should not give up the fragrant weed and convert my smoking room into a library (*f*).

There can be no enlargement. If a person opens new lights, or enlarges old ones, these new lights or enlargements may be obstructed with impunity; but the

(*y*) *Perry v. Eames*, [1891] 1 Ch. 658; 60 L. J. Ch. 345; *Wheaton v. Maple*, [1893] 3 Ch. 48; 62 L. J. Ch. 963.

(*z*) *Aynsley v. Glover* (1875), L. R. 10 Ch. 283; 44 L. J. Ch. 523; *Kelk v. Pearson* (1871), L. R. 6 Ch. 809; 24 L. T. 890; *Norfolk v. Arbuthnot* (1880), 5 C. P. D. 390; 49 L. J. C. P. 782.

(*a*) See *Seddon v. Bank of Bolton* (1882), 51 L. J. Ch. 542. As to what is a sufficient interruption, see the recent case of *Presland v. Bingham* (1889), 41 Ch. D. 268; 60 L. T. 433.

(*b*) (1840), 11 A. & E. 688; 8 C. & F. 231; and see *Glover v. Coleman* (1874), L. R. 10 C. P. 108; 44 L. J. C. P. 66.

(*c*) *Potts v. Smith* (1868), L. R. 6 Eq. 311; 38 L. J. Ch. 58; *Roberts v. Macord* (1832), 1 M. & Rob. 230.

(*d*) *Courtauld v. Legh* (1869), L. R. 4 Ex. 126; 38 L. J. Ex. 45; *Collis v. Laughner*, [1894] 3 Ch. 659; 63 L. J. Ch. 851.

(*e*) (1878), 3 Q. B. D. 178; 47 L. J. Q. B. 334; expressly overruling *Martin v. Goble* (1808), 1 Camp. 320.

(*f*) See *Aynsley v. Glover*, *supra*.

original lights are still entitled to protection (*g*). The recent case of *Fowlers v. Walker* (*h*) should be referred to on this branch of the subject. In 1868 three cottages at Liverpool containing ancient lights were pulled down, and a large warehouse was built on their site containing three large windows. There was no satisfactory evidence as to the position of the windows in the cottages, though it was admitted that *small parts of the new windows might occupy portions of space through which light was admitted to the cottages*. In an action against some people who proposed to darken, it was held that, in the absence of evidence as to the position of the ancient lights, the easement could not be maintained as to the new building. "It is a novel case," said James, L. J., "upon this point, that it is not the case of enlarged windows, but of old cottages converted into a magnificent block of warehouses. The whole structure has been altered, and the only suggestion made is that in this palatial store, which has superseded the humble cottages, there are some portions of the existing windows which coincide with some portions of the old windows. . . . Where there has been such a change, it is incumbent on the plaintiffs to give satisfactory evidence that there is so much of the old aperture of the window existing that the Court can see that the diminution of light creates substantial interference with the plaintiff's right" (*i*).

The right to ancient lights is abandoned by pulling down the building, or blocking up the lights, with the intention of abandoning (*k*). The question of intention is one of fact, depending on the circumstances of each case.

The acquiring of a right to light under the statute is *suspended* during the continuance of a *unity of possession* of the dominant and servient tenements (*l*).

A man cannot derogate from his own grant.

(*g*) See *National Ins. Co. v. Prud. Ass. Co.* (1877), 6 Ch. D. 757; 46 L. J. Ch. 871; *Barnes v. Louch* (1879), 4 Q. B. D. 494; 48 L. J. Q. B. 756; *Ecl. Comm. v. Kino* (1882), 14 Ch. D. 213; 49 L. J. Ch. 529.

(*h*) (1882), 51 L. J. Ch. 443; 42 L. T. 356; and see *Scott v. Pape* (1886), 31 Ch. D. 554; 55 L. J. Ch. 426, where it was held that an easement of ancient lights will not necessarily be treated as abandoned because the old building has been pulled down and another substituted. See also *Bullers v. Dickinson* (1885), 29 Ch. D. 155;

54 L. J. Ch. 776; *Harris v. De Pinna* (1886), 33 Ch. D. 238; 56 L. J. Ch. 344; *Greenwood v. Hornsey* (1886), 33 Ch. D. 471; 55 L. J. Ch. 917 (in which *Holland v. Worley* (1884), 26 Ch. D. 578; 54 L. J. Ch. 268, was not followed); *Martin v. Price*, [1891] 1 Ch. 276; 63 L. J. Ch. 209.

(*i*) And see *Pendarves v. Monro*, [1892] 1 Ch. 611; 61 L. J. Ch. 494.

(*k*) *Moore v. Rawson* (1824), 3 B. & C. 332; 5 D. & R. 234; *Stokoe v. Singers* (1857), 8 E. & B. 31; 26 L. J. Q. B. 257.

(*l*) *Ladyman v. Grave* (1871), L. R. 6 Ch. 763; 25 L. T. 52.

Abandonment of right.

Suspension.

Must not derogate from grant.

"There can be no doubt that the law as laid down by *Palmer v. Fletcher* (*m*) is the law of the present day; that is, that *where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights*. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house *simply as a house*, or whether he grants the house *with the windows or the lights* thereto belonging. In both cases he grants with the apparent easements or *quasi* easements. All that is now, I take it, settled law.

"I take it also that it is equally settled law that *if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house*.

"Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights, can it be said that the purchaser of the land is entitled to block up the lights, the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? Certainly not" (*n*).

The maxim that a grantor shall not derogate from his grant received an important limitation in the recent case of *Birmingham Banking Co. v. Ross* (*o*), where it was held that a grantee of a house was not entitled to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee (*p*).

Air.

Though the two subjects are often incorrectly treated as if they rested on the same principles, *a right to air is quite distinct from a right to light*. In *Webb v. Bird* (*q*) it was held that the owner of a windmill could not, under sect. 2 of the Prescription Act, prevent the owner of adjoining land from building so as to interrupt the

(*m*) (1675), 1 Sid. 167, 227. The principle of this case is applicable not only to conveyances for valuable consideration, but also to devises and voluntary conveyances: see *Phillips v. Low*, [1892] 1 Ch. 47; 61 L. J. Ch. 44.

(*n*) Per Jessel, M. R., in *Allen v. Taylor* (1880), 16 Ch. D. 355; 50 L. J. Ch. 178; and see *Swansborough v. Coventry* (1832), 9 Bing. 305; 2 M. & S. 362; *Compton v. Richards* (1814), 1 Price, 27; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; 48 L. J. Ch. 853; *Russell v. Watts* (1885), 10 App. Ca. 590; 55 L. J. Ch. 158; *Robson*

v. Edwards, [1893] 2 Ch. 146; 62 L. J. Ch. 378.

(*o*) (1888), 38 Ch. D. 295; 57 L. J. Ch. 601.

(*p*) See also *Myers v. Catterson* (1889), 43 Ch. D. 470; 62 L. T. 205; *Wilson v. Queen's Club*, [1891] 3 Ch. 522; 60 L. J. Ch. 698; *Corbett v. Jonas*, [1892] 3 Ch. 137; 62 L. J. Ch. 43. An instructive article on "Quasi Grant of Easements" in the "Law Quarterly Review" (1894), page 323, may be referred to on this subject.

(*q*) (1863), 13 C. B. N. S. 841; 31 L. J. C. P. 335.

passage of air to the mill, although it had been worked by this air for more than twenty years. "That which is claimed here," said Willes, J., in the Court below (*r*), "amounts to neither more nor less than this—that a person having a piece of ground and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon it, if by so doing the free access of wind from any quarter should be impeded or obstructed. It is impossible to see how the adjoining owners could prevent the acquisition of such a right, except by *combining together to build a circular wall round the mill within twenty years*. It would be absurd to hold that men's rights are to be made dependent on anything so inconvenient and impracticable."

Webb v. Bird.

So, too, in the case of Bryant v. Lefever (*s*), it was held that the access of air to chimneys cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act.

Bryant v. Lefever.

In the recent case of Bass v. Gregory (*t*), the right to a passage of air through a defined channel was allowed. There, the cellar of the plaintiff's public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well, situated in an adjoining yard, owned and occupied by the defendant, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, and with the knowledge of the occupiers of the yard. Baron Pollock held, that the plaintiffs could legally claim, as against the defendant, the easement of the free passage of air from the cellar, and that a lost grant of the right ought to be inferred.

Bass v. Gregory.

An action may lie in a case where the stoppage of air is injurious to health (*u*).

Reference, however, should be made to the judgments in the recent case of Chastey v. Ackland (*x*), where it was held that no right to the undefined passage of air can be acquired either under the Prescription Act, or by prescription at common law, or by presumption of a lost grant. Therefore, where a defendant by building on his own land intercepted the current of air which blew laterally from the defendant's premises past the plaintiffs' premises, which

Chastey v. Ackland.

(*r*) (1862), 10 C. B. N. S. 268.
(*s*) (1879), 4 C. P. D. 172; 48 L. J. Ch. 380; and see the still more recent case of Harris v. De Pinna, *supra*.

L. J. Q. B. 574.

(*u*) City of London Brewery Co. v. Tennant (1873), L. R. 9 Ch. 212; 43 L. J. Ch. 457.

(*x*) [1895] 2 Ch. 389; 64 L. J. Q. B. 523.

(*t*) (1890), 25 Q. B. D. 481; 59

were more than twenty years old, and thereby caused the air in the plaintiffs' yard to become more stagnant, the Court held that the plaintiffs were not entitled to an injunction to compel the defendant to pull down his building. It was a case of *damnum absque injuriâ*.

Interrup-
tion of
view.

It is scarcely necessary to say that there is no right of action against a builder who comes and spoils a *landscape* (y).

Sic utere tuo ut alicuius non lædas.

[106.]

FLETCHER v. RYLANDS. (1868)

[L. R. 3 H. L. 330 ; 37 L. J. Ex. 161.]

Some mill-owners made a reservoir, employing a competent engineer and first-class workmen. During the construction of it, the workmen came upon some old vertical mine shafts, of the existence of which no one was previously aware. These they carefully filled up with soil. But, when the water came to be put into the reservoir, it ran through, and did mischief to the neighbouring mines of Mr. Fletcher, who instituted legal proceedings. The mill-owners defended the action, thinking that as they had employed competent persons to construct the reservoir, they would not be held responsible. But they were mistaken. On the ground that *a person who brings on his land anything which, if it should escape, may damage his neighbour, does so at his peril*, negligence or not being quite immaterial, they were compelled to compensate Mr. Fletcher for the damage the water had inflicted on his mines.

(y) Aldred's case (1611), 9 Coke's Rep. 58, a.

NICHOLS v. MARSLAND. (1876)

[107.]

[2 Ex. D. 1; 46 L. J. Ex. 174.]

Mrs. Marsland was the proprietor of some ornamental lakes in the county of Chester. She had not made them herself. They had existed time out of mind, and had always borne the character of being substantially-constructed lakes. But on the 18th of June, 1872, there came a tremendous storm, the like of which the oldest inhabitant could not remember. The rains descended, the floods came, and Mrs. Marsland's lakes burst their fetters, and swept away two or three county bridges. Nichols was the county surveyor of Cheshire, and brought this action for the damage done. It was argued for the surveyor, with much plausibility, that Mrs. Marsland was in the same position as a person who keeps a mischievous animal with knowledge of its propensities, and therefore that inquiry as to whether she has been negligent or not was needless,—she kept the lakes at her peril. It was held, however, that as the lakes had been carefully constructed and maintained, and the downpour of rain was so extraordinary as to amount to *vis major*, the defendant was not responsible.

“A man must keep his own filth on his own ground,” says an old case in Salkeld (z), and the principle is the foundation of Fletcher v. Rylands. By all means do what you will with your own, but *sic utere tuo ut alienum non lædas*. For this reason, when a man brings on to his land anything that will do damage to his neighbour if it escapes, he keeps it at his peril (a). *Sic utere tuo.*

Ballard v. Tomlinson (b) was decided on this ground. The plaintiff and defendant were adjoining landowners, and each had a deep Ballard v. Tomlinson.

(z) Tenant v. Goldwin (1705), 1 Salk. 360; 2 Ld. Raym. 1089.

(a) See National Telephone Co. v. Baker, [1893] 2 Ch. 186; 62 L. J. Ch. 699, where it was held that the creation and discharge of an electrical current beyond the control of the person creating it renders

him liable for the damage the current may cause. And see Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287; 64 L. J. Ch. 216.

(b) (1885), 29 Ch. Div. 115; 54 L. J. Ch. 451.

well on his own land, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and so polluted the water that percolated underground from the defendant's to the plaintiff's land, and consequently the water which came into the plaintiff's well from such percolating water when he used his well by pumping, came adulterated with the sewage from the defendant's well. It was held that the plaintiff had a right of action against the defendant for so polluting the source of supply, although, until the plaintiff had appropriated it, he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping.

The mound.

The cow that swallowed the wire.

Yew trees.

Thistles.

Tigers as pets.

In *Hurdman v. The North Eastern Railway Company* (*c*), the defendants were held responsible for having on their own land built an artificial mound so close to the plaintiff's house as to render it damp and unhealthy by the rain oozing through. *Firth v. The Bowling Iron Co.* (*d*), where the plaintiff's cow had swallowed a bit of decayed wire which had fallen from the defendants' fence and been poisoned by it, is to the same effect; and so is *Crowhurst v. The Amersham Burial Board* (*e*), where the plaintiff's horse had been poisoned by eating of a yew tree which the defendants had planted so near their boundary that it projected into the adjoining meadow of the plaintiff. But in *Wilson v. Newberry* (*f*), it was held that a man is not liable to an action merely because by some unexplained means, the leaves from a yew tree growing on his land get on to his neighbour's land, and are there eaten by, and poison, his cattle. Nor is a man, having a yew tree upon his land, but being under no obligation to fence against his neighbour's cattle, liable for damages caused to such cattle by eating of the yew tree when trespassing on his land (*g*). In the recent case of *Giles v. Walker* (*h*), an occupier of land neglected to cut thistles growing naturally on his land, with the result that the seeds were blown on to his neighbour's land and caused damage; and it was held that he was not liable, on the ground that he was under no duty towards his neighbour to cut down the thistles, as they were the natural growth of his land.

It has long been a settled legal principle that a person who keeps a savage animal, such as a tiger or a lion, does so at his peril. If the animal escapes and hurts anyone, it is not necessary for the

(*c*) (1878), 3 C. P. D. 168; 47 L. J. C. P. 368.

(*d*) (1878), 3 C. P. D. 254; 47 L. J. C. P. 358.

(*e*) (1878), 4 Ex. D. 5; 48 L. J. Ex. 109.

(*f*) (1871), L. R. 7 Q. B. 31; 41 L. J. Q. B. 31.

(*g*) *Pouting v. Noakes*, [1894] 2 Q. B. 281; 63 L. J. Q. B. 549.

(*h*) (1890), 24 Q. B. D. 656; 59 L. J. Q. B. 416.

party injured to show that the owner knew the animal to be specially dangerous. In *May v. Burdett* (*i*), which was the case of a monkey biting a lady, Lord Denman, C.J., said, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after knowledge of its mischievous propensities." So, too, it has been recently held that the owner of an elephant keeps it at his peril, and is liable for any injury it may cause (*k*). The monkey case.
Elephant.

In the case of an action for a dog-bite, the plaintiff must prove what is called "the *scienter*," that is, that the defendant knew the dog to be specially dangerous. The knowledge of the servant having charge of the dog is the knowledge of the master (*l*); and a complaint to the owner's wife (*m*), or barmaid (*n*) on the premises, to be communicated to the owner, may be evidence of knowledge. It is not necessary to prove that the dog has actually bitten anyone before (*o*); but the plaintiff must go further than merely to show that it was usually kept tied up (*p*) on account of its supposed ferocity. An offer of compensation is no evidence of the *scienter* (*q*). Dogs.
Proof of the *scienter*.

There is authority for the proposition that a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose at night (*r*). But in these days of law and order a defendant would have to make out a pretty clear case of such a strong precaution being really necessary to his safety. Ferocious dog for protection of premises.

By 28 & 29 Vict. c. 60, s. 1, it is enacted that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner." *Horses* are "cattle" within the section (*s*). Dog not entitled even to one worry.

Generally, no action will lie against the owner of a dog which

(*i*) (1846), 9 Q. B. 101; 16 L. J. Q. B. 64.

(*k*) *Filburn v. People's Palace Co.* (1890), 25 Q. B. D. 258; 59 L. J. Q. B. 471.

(*l*) *Baldwin v. Casella* (1872), L. R. 7 Ex. 325; 41 L. J. Ex. 167.

(*m*) *Gladman v. Johnson* (1867), 36 L. J. C. P. 153; 15 L. T. 476.

(*n*) *Appleby v. Percy* (1874), L. R. 9 C. P. 647; 43 L. J. C. P. 365.

(*o*) *Worth v. Gilling* (1866), L. R. 2 C. P. 1.

(*p*) *Beck v. Dyson* (1815), 4 Camp. 198.

(*q*) *Beck v. Dyson*, *supra*.

(*r*) *Brock v. Copeland* (1794), 1 Esp. 203; *Sarch v. Blackburn* (1830), 4 C. & P. 300; *M. & M.* 505; *Curtis v. Mills* (1833), 5 C. & P. 489.

(*s*) *Wright v. Pearson* (1869), L. R. 4 Q. B. 582; 38 L. J. Q. B. 312.

Read v.
Edwards.

has invaded my garden and spoilt my crops; but in *Read v. Edwards*(*t*) it was held that an action lay against the owner of a dog, who, *knowing the animal to have a propensity for chasing and destroying game*, permitted it to be at large, the consequence of which was that the dog entered the plaintiff's wood, and chased and destroyed young pheasants which were being reared there under domestic hens.

Responsi-
bility of
owner for
trespasses
of cattle.

Ellis v.
Loftus
Iron Co.

A man is responsible for the trespasses of his cattle and other animals in which the law gives him a valuable property. A few years ago, a horse and mare in adjoining fields had a little neighbourly difference of opinion about some matter of equine interest, and finally the horse, with a sad lack of gallantry, *kicked the mare through the fence*. It was held that the owner of the horse, quite apart from any question of negligence, was liable for the injury so done to the mare(*u*). But the defendant might sometimes get on the right side of an action of this kind by showing that it was all through the plaintiff's not fencing properly, as he was bound by prescription or otherwise to do(*x*).

See the recent case of *Farrer v. Nelson*(*y*) with regard to actions for overstocking land with game by which injury is done to crops.

Vis major.

Nichols v. Marsland engrafts on the rule of *Fletcher v. Rylands* the qualification that, although a man brings on to his land what will do damage if it escapes, still he is not responsible if the escape is due to causes beyond his own control, and amounting to *vis major*(*z*); and in the later case of *Box v. Jubb*(*a*), the same Court held that for the wrongful act of a *third party*, which set the damage in motion, the proprietor was no more responsible than for *vis major*. Moreover, a man who brings water on to his land *in the ordinary, reasonable, and proper mode of enjoying his land*, is only liable for an escape which is attributable to negligence. Thus in *Ross v. Fedden*(*b*), it was held that the occupier of an upper floor, who had not been in any way negligent was not liable to the occupier of a lower for the leakage of water from a water-closet of which he had the exclusive use.

Act of
third
party.

Ross v.
Fedden.

(*t*) (1864), 17 C. B. N. S. 245; 34 L. J. C. P. 31.

(*u*) *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10; 44 L. J. C. P. 24; but see *Cox v. Burbridge* (1863), 13 C. B. N. S. 430; 32 L. J. C. P. 89.

(*x*) See *Lee v. Riley* (1865), 18 C. B. N. S. 722; 34 L. J. C. P. 212; *Rooth v. Wilson* (1817), 1 B. & Ald. 59; *Powell v. Salisbury* (1828), 2 Y. & J. 391; *Tillett v. Ward* (1882), 10 Q. B. D. 17; 52

L. J. Q. B. 61.

(*y*) (1885), 15 Q. B. D. 258; 54 L. J. Q. B. 385.

(*z*) See also *Thomas v. Birm. Canal Co.* (1879), 43 L. T. 435; 49 L. J. Q. B. 851.

(*a*) (1879), 4 Ex. D. 76; 48 L. J. Ex. 417; and see *Carstairs v. Taylor* (1871), L. R. 6 Ex. 217; 40 L. J. Ex. 29.

(*b*) (1872), L. R. 7 Q. B. 661; 41 L. J. Q. B. 270.

In the recent case of *Dixon v. The Metropolitan Board of Works* (c), the action was by a coal-merchant to recover damages for injury to a barge, coals, &c., belonging to him, caused by the defendants' negligence. On the 29th of August, 1879, there was an exceptionally heavy rain-fall, and the defendants had opened the water-gates of one of their sewers to prevent a large district from being flooded. There was, of course, a great rush of water, and the coal-merchant's belongings were swept away before it. It was held that, as the injury was caused by the opening of the water-gates, and not by the act of God, the defendants were *primâ facie* liable for the damage done, within the principle of *Fletcher v. Rylands*, but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what Parliament had authorized them to do, they were *not* liable.

Dixon v. Metropolitan Board of Works.

As to the liability of neighbouring mine-owners, it was held, in *Smith v. Kenrick* (d), that the owner of a colliery lying on a higher level than another was not responsible for damage done to the latter by its being flooded through the usual and proper taking of coal from the former. But a man cannot work a mine which can only be worked by letting in a river and flooding a neighbour's mine (e); and where a mine-owner diverts the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow (f).

Smith v. Kenrick.

Smith v. Kenrick was discussed and distinguished in the recent case of the Attorney-General *v. Tomline* (g), where it was held that an action would lie by the Attorney-General, at the relation of the owner of the land within, to restrain the owner of the foreshore from removing the shingle in such a manner as to endanger the land within by exposing it to inroads of the sea.

Colonel Tomline's case.

See also the recent case of *Whalley v. Lanc. & Yorks. Ry. Co.* (h), where the defendants were held liable for having, in self-protection, transferred a quantity of water, the result of an unprecedented rainfall, to adjoining lands, by cutting trenches in their embankment.

Whalley's case.

(c) (1881), 7 Q. B. D. 418; 50 L. J. Q. B. 772; but see *Powell v. Fall* (1880), 5 Q. B. D. 597; 49 L. J. Q. B. 428; *Sadler v. South Staffordshire, &c. Tramways Co.* (1889), 23 Q. B. D. 17; 58 L. J. Q. B. 421.

(d) (1849), 7 C. B. 515; 18 L. J. C. P. 172.

(e) *Crompton v. Lea* (1874), L. R.

19 Eq. 115; 44 L. J. Ch. 69.

(f) *Fletcher v. Smith* (1877), 2 App. Ca. 781; 47 L. J. Ex. 4; and see *Baird v. Williamson* (1863), 15 C. B. N. S. 376; 33 L. J. C. P. 101.

(g) (1880), 14 Ch. D. 58; 49 L. J. Ch. 377.

(h) (1884), 13 Q. B. D. 131; 53 L. J. Q. B. 285.

Proximate Cause.

[108.]

SCOTT *v.* SHEPHERD. (1773)

[2 W. BL. 892.]

Mr. Shepherd, of Milbourne Port, determined to celebrate the happy deliverance of that august and wise monarch, James I., in the orthodox fashion ; and with that intention, he, some days before the 5th, laid in a plentiful pyrotechnic supply. Being not only of a pious and patriotic spirit, but also a man not destitute of humour, he threw a lighted squib into the market house at a time when it was crowded with those that bought and sold. The fiery missile came down on the shed of a vendor of ginger-bread, who, to protect himself, caught it dexterously and threw it away from him. It then fell on the shed of another ginger-bread seller, who passed it on in precisely the same way ; till at last it burst in the plaintiff's face and put his eye out.

Scott brought an action against the original thrower of the squib, who objected that he was not responsible for what had happened, when the squib had passed through so many hands : but though he persuaded the learned Mr. Justice Blackstone to agree with him, the majority of the Court decided that he *must be presumed to have contemplated all the consequences* of his wrongful act, and was answerable for them.



[109.]

SHARP *v.* POWELL. (1872)

[L. R. 7 C. B. 253 ; 41 L. J. C. P. 95.]

In defiance of an Act of Parliament, a corn-merchant's servant washed one of his master's vans in the street of a town. In warm weather no harm would have come of this

improper proceeding; the water would have found its way down a gutter and through a grating. But it happened to be very frosty, and (though the law-breaking servant did not know it) the grating was frozen over. The consequence was that the water, finding no escape, flowed about and formed a great sheet of ice, over which the plaintiff's horse slipped and got hurt.

The owner of the injured horse brought an action against the corn merchant, but it was held that, however improper it might be to wash a van in the public street, this was *not the proximate cause* of the injury; for the servant *could not be expected to foresee* that the consequence of his act would be that the water would freeze over so large a portion of the street as to occasion a dangerous nuisance.

Probably no case, except perhaps *Coggs v. Bernard*, is better known to the superficial student than the "squib case." It cannot be said, however, that its importance is equal to its popularity. In days gone by, it served to illustrate the distinction between the action of trespass and the action on the case; but it is now chiefly worth remembering as an authority on questions of consequential damage.

The rule is that damage to be actionable must be the ordinary and probable consequence of the act complained of; in other words, the act must be the proximate cause of the damage. If a candidate for parliamentary honours makes a stump oration inveighing at his opponents generally, and waves his hat into the bargain, that is not the proximate cause of one of those opponents getting his windows or his head broken (*i*). Generally, however, a man must be taken to contemplate all the consequences of his acts, and is responsible for them. A railway company negligently sent some empty trucks down an incline into a siding. The consequence was that a herd of cattle being driven along an occupation road got frightened, ran away, and after breaking down a fence or two succeeded in getting killed on quite another part of the company's line. The company were held responsible to the owner of the cattle (*k*). In a recent case (*l*) the following facts appeared. The

Ordinary and probable consequence.

Sneesby's case.

Clark v. Chambers.

(*i*) *Peacock v. Young* (1869), 18 W. R. 134; 21 L. T. 527.

(*k*) *Sneesby v. Lancashire & Yorkshire Ry. Co.* (1875), 1 Q. B. D.

42; 45 L. J. Q. B. 1. And see *The Gertor* (1894), 70 L. T. 703.

(*l*) *Clark v. Chambers* (1878), 3 Q. B. D. 327; 47 L. J. Q. B. 427.

Harris v.
Mobbs.

The mare
in the
cricket
field.

Victorian
Ry. Coms.
v. Coultas.

occupier of a field used for athletic sports put a barrier with iron spikes across the adjoining road, in order that the British public might not see the sports without paying. Somebody removed this barrier, and put it in a dangerous position across the footpath. The plaintiff was lawfully passing along this footpath at night, when his eye came into contact with one of the spikes. It was held that the occupier of the field, who had taken liberties with the road which he had no business to take, was liable notwithstanding the intervention of a third party. To take another recent case (*m*), the proprietor of a van and ploughing apparatus left it by the grassy side of a road to remain there all night. While it was there a farmer came by driving a mare, a confirmed kicker, though not so to his knowledge. The brute shied at the van, ran away, and kicked the farmer to death. In an action under Lord Campbell's Act, it was held that the van-proprietor was liable (*m*). "Though the immediate cause of the accident," said the Court, "was the kicking of the mare, still the unauthorised and dangerous appearance of the van and plough on the side of the highway was, within the meaning of the law, the proximate cause of the accident." The most recent decision on this subject is in the case of *Halestrap v. Gregory* (*n*). There the defendant owned a field in which he took horses in for agistment. This field was separated from another, let to a cricket club, by a wire fence, and there was a gate between the two fields. The plaintiff delivered a mare to the defendant for agistment. The defendant's servant negligently left the gate open, and the mare strayed into the cricket field. The cricketers tried to drive her back through the gate, using proper care and precaution, but she ran against the wire fence and sustained injuries. It was held that the defendant was liable; the natural consequence of the gate being left open was injury to the mare. "It is," said Wills, J. (with evident recollections of *Pickwick*), "the nature of an animal which has escaped from its own proper inclosure to resist either attempts to catch it or any well-meant endeavours to send it back again. It is a difficult thing to catch a stray horse which does not want to be caught and taken back to his proper inclosure; and it is by no means unnatural that a horse when driven back, even carefully as this mare was, should make a bolt of it. If there be wire fencing, it would be very likely to injure itself."

An important (but not very satisfactory) decision on remoteness of damage was recently given by the Privy Council in the case of

(*m*) *Harris v. Mobbs* (1878), 3 Ex. D. 268; 39 L. T. 164; and see *Wilkins v. Day* (1883), 12 Q.

B. D. 110; 49 L. T. 399.

(*n*) [1895] 1 Q. B. 561; 64 L. J. Q. B. 415.

Victorian Railway Commissioners v. Coultas(*o*). A husband and wife were driving in a buggy across a level railway crossing, when, owing to the negligence of the gatekeeper, the buggy was nearly but not quite run down by a passing train. The wife fainted and received a severe nervous shock from the fright, and in consequence afterwards suffered a severe illness. It was held, however, that the damage was too remote to be recovered. The following passage from Sir F. Pollock's valuable treatise on the Law of Torts (4th ed. p. 47), contains, it is submitted, a more accurate view of the law on this point. "The true question would seem to be whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead, in the plaintiff's case, to the physical effects complained of."

The principle of *Scott v. Shepherd* has been applied in a curious American case, where the defendant (with a certain amount of provocation) had seized a pickaxe and chased a little black boy through the streets of a town. The boy, in terror for his life, bolted into the plaintiff's store, and in his hurry knocked over a cask of wine. It was held that the defendant must pay for the good liquor lost (*p*). "There is nearly as much reason," said the Court, "for holding him liable for driving the boy against the wine cask, and thus destroying the plaintiff's property, as there would have been if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned." So in the American leading case of *Fent v. The Toledo Railway Company*, 59 Ill. 349, it was held that a railway company might be responsible to any extent to which a fire wrongfully caused by a spark from one of their engines might spread. "If loss has been caused by the Act," said Lawrence, C.J., "and it was under the circumstances a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause whether the house burned was the first or the tenth,—the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire"(*q*). But in the recent American case of *Scheffer v. Washington, &c. Railway Co.*(*r*), it was held that where an injury to a passenger by the negligence of the railway company carrying him caused insanity,

Some American cases.

(*o*) (1888), 13 App. Cas. 222; 57 L. J. P. C. 69. But see *Bell v. G. N. Ry. Co.* (1890), 26 L. R. Ir. 428.

(*p*) *Vanderburgh v. Truax* (1847),

4 Den. N. Y. 464.

(*q*) See *Smith v. L. & S. W. Ry. Co.* (1870), L. R. 6 C. P. 14; 40 L. J. C. P. 21.

(*r*) *Law Times*, Aug. 26th, 1882.

by reason of which he committed suicide, the injury was not the proximate cause of the death, and the company were not liable for such death.

The Salvation Army.

The case of *Beatty v. Gillbanks*(s) may be mentioned here as bearing indirectly on proximate cause. At Weston-super-Mare some eccentric religionists, calling themselves a Salvation Army, assembled and marched in procession through the streets of the town. Though their intention was lawful and innocent enough—that of singing hymns, and otherwise enjoying themselves in an emotional manner—they knew they were hated by the roughs, and that an attempt would be made to disturb the arrangements, with the probable result of a breach of the peace. In spite of this knowledge, it was held that they could not be rightly convicted of an unlawful assembly. “As far as these appellants are concerned,” said Field, J., “there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said that the conduct pursued by them on this occasion was such as on several previous occasions had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants, knowing when they assembled together that such consequences would again arise, are liable to this charge. Now, I entirely concede that *everyone must be taken to intend the natural consequences of his own acts*, and it is clear to me that if this disturbance of the peace was *the natural consequence* of acts of the appellants, they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.”

Responsibility for collecting crowds.

But “it is an old principle of law, that, if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. Therefore, where the defendant was in the habit of inviting persons into his own grounds to shoot pigeons, and the effect of that was that idle persons collected *near* the spot, trod down the grass of the neighbouring meadows, destroyed the fences, and created alarm and disturbance amongst the women and children in the adjoining thoroughfares, it was held that the defendant was guilty of a nuisance(*t*). So, where the defendant descended in a balloon into the plaintiff’s garden, and a number of persons rushed into

(s) (1882), 9 Q. B. D. 308; 51 L. J. M. C. 117.

(t) *R. v. Moore* (1832), 3 B. &

Ad. 184; *Walker v. Brewster* (1867), L. R. 5 Eq. 25; 37 L. J. Ch. 33.

the garden to render help and gratify their curiosity, and destroyed the plaintiff's hedges and crops, it was held that the defendant who had set the balloon in motion and caused the mischief was responsible for the injury" (*u*). This subject was dealt with at length by North, J., in the recent case of *Barber v. Penley* (*x*), where most of the earlier cases are referred to and explained. The case of "Charley's Aunt."

Negligence.

READHEAD *v.* MIDLAND RAILWAY CO. (1869) [110.]

[L. R. 4 Q. B. 379; 38 L. J. Q. B. 169.]

Mr. Readhead was a passenger from Nottingham to South Shields, and on the journey the carriage in which he was travelling left the metals and was upset. This mishap was occasioned by the breaking of the tyre of one of the wheels of the carriage, owing to a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking. This being so, it was held that, though Mr. Readhead might have sustained very severe injuries, the company were under no obligation to make him compensation. It may be mentioned, however, that in the Court below Mr. Justice Blackburn had delivered a strong dissenting judgment against the railway company.

Carriers of *passengers* are not, like carriers of *goods*, insurers; and, accordingly, before one of their victims can recover damages, he Duty of carrier of passengers.

(*u*) *Guille v. Swan* (1822), 19 Johns. (U. S. R.) 381; Add. Torts (5th ed.), p. 109; see also *Glover v. L. & S. W. Ry. Co.* (1867), L. R. 3 Q. B. 25; 37 L. J. Q. B. 57; *Metropolitan Ry. Co. v. Jackson* (1877), 3 App. Cas. 193; 47 L. J. C. P. 303.
(*x*) [1893] 2 Ch. 447; 62 L. J. Ch. 623. And see *Bellamy v. Wells* (1891), 60 L. J. Ch. 156; 63 L. T. 635.

must prove a breach of duty (*y*). Their duty is—as was said in the leading case—“*to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and is not a warranty that the carriage in which he travels shall be in all respects fit for its purpose.*”

Hyman *v.*
Nye.

In the recent case of *Hyman v. Nye* (*z*) (where the plaintiff had hired from the defendant, a jobmaster, for a drive from Brighton to Shoreham and back, a carriage, a pair of horses, and a driver, and an accident had occurred), it was held that the duty of a jobmaster who lets out carriages, &c., is to supply a carriage as fit for the purpose for which it is hired as care and skill can make it, “and if, whilst the carriage is being properly used for such purpose, it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs* (2 Camp. 80), and as the railway company did in *Readhead v. Midland Ry. Co.*, he will not be liable; but no proof short of this will exonerate him” (*a*).

Accident
not im-
putable.

In an action for personal injuries the great obstacle to the plaintiff's success generally is to prove that the act complained of was either wilful or negligent. The defendant cannot be made responsible for a mere accident. In *Holmes v. Mather* (*b*), a gentleman at North Shields had tried some horses for the first time in double harness. The horses did not take kindly to it, and the plaintiff got knocked down. “The driver,” said Bramwell, B., “is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye and so injured it. . . . *For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on*

(*y*) See *Cobb v. G. W. Ry. Co.*, [1894] A. C. 419; 63 L. J. Q. B. 629, where the defendants were held not liable to a passenger who had been robbed while travelling in a railway carriage which was overcrowded owing to the negligence of their servants. See also *Pounder v. N. E. Ry. Co.*, [1892] 1 Q. B.

385; 61 L. J. Q. B. 136.

(*z*) (1881), 6 Q. B. D. 685; 44 L. T. 919; and see *Gilbert v. North London Ry. Co.* (1883), 1 C. & E. 31.

(*a*) Per Lindley, J.

(*b*) (1875), L. R. 10 Ex. 261; 44 L. J. Ex. 176.

the part of others cannot avoid." In another well-known case (*c*), a coachman drove his coach against a bank. He had been past the same spot only twelve hours before, but in the interval a cottage which served him as a landmark had been pulled down and carted away. It was held that this was an accident for which no one could be made responsible. So, in the recent case of *Manzoni v. Douglas* (*d*), where a horse drawing a brougham in a London street had suddenly and without apparent reason bolted and knocked the plaintiff down, it was held that an action could not be maintained. "To hold," said Lindley, J., "that the mere fact of a horse bolting is *per se* evidence of negligence would be mere reckless guesswork." The American case of *Brown v. Kendall* (*e*), also illustrates this point. The dogs of plaintiff and defendant got fighting, and the defendant, in trying to separate them with a long stick, unfortunately knocked out the eye of the plaintiff, who was standing behind him. It was held that the defendant was not liable for this mischief. "If," said Shaw, C. J., "in the prosecution of a lawful act, a casualty, purely accidental, arises, no action can be supported for an injury arising therefrom."

Manzoni
v. Douglas.

In an action for personal injuries by negligence, it is the province of *the judge* to say whether there is evidence from which negligence *may* be reasonably inferred, and of *the jury* (if the evidence is left to them) to say whether it *ought* to be inferred (*f*).

Respective
provinces
of judge
and jury.

Sometimes, however, *res ipsa loquitur*; the mere happening of a disaster may be sufficient to raise a presumption of negligence, which the defendant must rebut if he can. This is so, for instance, where the thing that caused the mischief was so exclusively under the defendant's control, that it is hardly credible that any harm could have come from it without his default. A gentleman was once guilelessly walking down a Liverpool street when suddenly a barrel of flour came down on his head from the upper window of a flour dealer's shop, and the subsequent proceedings for some time to come did not greatly interest him. In an action against the flour dealer, it was held that *the mere unexplained fact of the accident happening at all* was evidence of negligence (*g*). The same principle of law was laid down in a case where a custom-house officer, lawfully in some docks, was knocked down by a bag of

*Res ipsa
loquitur.*

(*c*) *Crofts v. Waterhouse* (1825), 3 Bing. 319.

(*d*) (1880), 6 Q. B. D. 145; 50 L. J. Q. B. 289; and see *Hammack v. White* (1862), 11 C. B. N. S. 588; 31 L. J. C. P. 129.

(*e*) (1850), 6 Cush. 292.

(*f*) *Met. Ry. Co. v. Jackson*

(1877), 3 App. Ca. 193; 47 L. J. C. P. 303; and see *Dublin, &c., Ry. Co. v. Slattery* (1878), 3 App. Ca. 1155; 39 L. T. 365.

(*g*) *Byrne v. Boodle* (1863), 2 H. & C. 722; 33 L. J. Ex. 13. But see *Crisp v. Thomas* (1891), 63 L. T. 756; 55 J. P. 261.

sugar lowered by a crane overhead (*h*); and in a third case, where a brick fell from a railway bridge on a person walking peaceably along the Queen's highway below (*i*).

Door flying open. A railway passenger, it has been held, is entitled to assume that the door is properly shut, and to act accordingly (*k*). And the moral of another case (*l*) seems to be that if it happens that the door is not shut, or if it flies open, the passenger had better not make any effort to close it, but get to the other side of the carriage, and let it bang itself to splinters.

Train not alongside platform. A good many actions against railway companies are brought by persons who have sustained hurt by their trains overshooting the platforms, or not getting properly up to them. The mere fact of a train doing a thing of this kind is not evidence of negligence; but in such a case it becomes the duty of the railway servants to take immediate steps to prevent people getting out and hurting themselves. The shouting out the name of the station is not necessarily an invitation to alight; but the bringing up of the train to a final standstill at a station, at all events after such a time has elapsed that the passengers may reasonably infer that they are expected to get out, is an invitation. The following cases may be consulted in support of this statement of the law:—*Cockle v. S. E. Ry. Co.* (1872), L. R. 7 C. P. 321; 41 L. J. C. P. 140; *Praeger v. Brist. & Ex. Ry. Co.* (1870), 24 L. T. 105; *Bridges v. North London Ry. Co.* (1874), L. R. 7 H. L. 213; 43 L. J. Q. B. 151; *Robson v. N. E. Ry. Co.* (1876), 2 Q. B. D. 85; 46 L. J. Q. B. 50; *Siner v. G. W. Ry. Co.* (1869), L. R. 4 Ex. 117; 38 L. J. Ex. 67; *Rose v. N. E. Ry. Co.* (1876), 2 Ex. D. 248; 46 L. J. Ex. 374; *Lax v. Darlington* (1879), 5 Ex. D. 28; 49 L. J. Ex. 105; *Weller v. L. B. & S. C. Ry. Co.* (1874), L. R. 9 C. P. 126; 43 L. J. C. P. 137; *Hella-well v. L. & N. W. Ry. Co.* (1872), 26 L. T. 557; *Thompson v. Belfast Ry. Co.* (1871), Ir. Rep. 5 C. L. 517.

Invitation to alight. The omission to take a precaution enjoined by statute (*e. g.*, to keep a gate at a level crossing) amounts to negligence (*m*). But

Statutory precaution disregarded.

(*h*) *Scott v. Lond. Docks Co.* (1865), 3 H. & C. 596; 34 L. J. Ex. 220.

(*i*) *Kearney v. L. B. & S. C. Ry. Co.* (1871), L. R. 6 Q. B. 759; 40 L. J. Q. B. 285; see also *Skinner v. L. B. & S. C. Ry. Co.* (1850), 5 Ex. 787; 15 Jur. 299; *Carpue v. L. B. & S. C. Ry. Co.* (1844), 5 Q. B. 747; 13 L. J. Q. B. 138; *Bird v. G. N. Ry. Co.* (1858), 28 L. J. Ex. 3.

(*k*) *Gee v. Metr. Ry. Co.* (1873), L. R. 8 Q. B. 161; 42 L. J. Q. B. 105.

(*l*) *Adams v. Lane. & Y. Ry. Co.* (1869), L. R. 4 C. P. 739; 38 L. J. C. P. 277.

(*m*) See *Stapley v. L. B. & S. C. Ry. Co.* (1865), L. R. 1 Ex. 21; 35 L. J. Ex. 7; *Wanless v. N. E. Ry. Co.* (1874), L. R. 7 H. L. 12; 43 L. J. Q. B. 185; *Wright v. G. N. Ry. Co.* (1881), L. R. (Ir.) 8, 257; *Wakelin v. L. & S. W. Ry. Co.* (1886), 12 App. Ca. 41; 56 L. J. Q. B. 229; *Fenna v. Clare*, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238.

the omission to guard against extraordinary accidents is not negligence (*u*): nor is the omission of a merely voluntary precaution (*o*). Each case, however, depends on its own circumstances. In *Shepherd v. Midl. Ry. Co.* (*p*), the action was by a Bedfordshire attorney who, while smoking a cigar on the platform of the Ampthill Station, and waiting for his train, one frosty day in 1870, "felt his legs suddenly go from under him, and fell heavily on the platform, where he lay until assistance was procured to enable him to rise." The cause of this accident was a strip of ice; and the plaintiff considered he was entitled to damages out of the railway company. In this view he was confirmed by the judges. "It strikes me," said Martin, B., "that the railway servants ought to be *on the alert during such weather* to see that there is no ice upon the platform, and to remove it, or render it harmless, if there." Voluntary precaution dropped.
Ice on railway platform.

In the recent case of *Simkin v. L. & N. W. Ry. Co.* (*q*), it was held that a railway company is not guilty of negligence in not screening their line from an approach road to their station, so as to prevent horses being alarmed by the sight of locomotives.

It is to be observed that a passenger may enter into a special contract with the carrier to be carried at his own risk; and in that case no amount of negligence would found an action (*r*). Such a condition exempts a railway company from responsibility, not only *during the journey*, but also *while the passenger is coming to or leaving their premises*. And it even extends to protect another railway company over whose line the company making the special contract have running powers (*s*). The condition is usually imposed on a drover in charge of cattle who receives a free pass (*t*). Passenger carried at own risk.

A railway company are required by the 68th section of the Railway Clauses Act, 1845 (*u*), to make and maintain fences, &c., for the accommodation of the owners and occupiers of adjoining lands, and they will therefore be liable to those owners and occupiers for losses resulting through breach of this statutory duty (*v*). Fences.

(*u*) *Blyth v. Birm. Waterworks Co.* (1856), 11 Ex. 781; 25 L. J. Ex. 210; and *Thomas v. Birm. Canal Co.* (1879), 43 L. T. 435; 49 L. J. Q. B. 851. W. Ry. Co. (1875), L. R. 10 Q. B. 212; 44 L. J. Q. B. 89.

(*o*) *Skelton v. L. & N. W. Ry. Co.* (1867), L. R. 2 C. P. 631; 36 L. J. C. P. 249. (*s*) *Hall v. N. E. Ry. Co.* (1875), L. R. 10 Q. B. 437; 44 L. J. Q. B. 164.

(*p*) (1872), 25 L. T. 879; 20 W. R. 705. (*t*) See *Duff v. G. N. Ry. Co.* (1878), 4 L. R. (Ir.) 178; 41 L. T. 197.

(*q*) (1888), 21 Q. B. D. 453; 59 L. T. 797. (*u*) 8 & 9 Vict. c. 20.

(*r*) *McCawley v. Furness Ry. Co.* (1872), L. R. 8 Q. B. 57; 42 L. J. Q. B. 4; *Gallin v. L. & N.* (*v*) See *Corry v. G. W. Ry. Co.* (1881), 7 Q. B. D. 322; 50 L. J. Q. B. 386; *Charman v. S. E. Ry. Co.* (1888), 21 Q. B. D. 524; 57 L. J. Q. B. 597.

But if cattle stray into a field adjoining the line, and thence get on to the line and are killed, the company will not be responsible (*y*).

The cow
and the
statue.

Market owners who take toll from persons attending the market with their cattle are bound to keep the market in a reasonably safe condition, and on this ground the mayor, aldermen, and burgesses of the borough of Darlington were held liable for the loss of a cow which was so irreverent, and, as it turned out, so indiscreet as to try to jump over a spiked fence surrounding the statue of a local hero (*z*). So, in the case of *Francis v. Cockrell* (*a*), it was held that "where money is paid by spectators at races or other public exhibitions for the use of temporary stands or platforms, there is an implied warranty on the part of the person receiving the money that due care has been used in the construction of the stand by those whom he has employed as independent contractors to do the work as well as by himself."

Randall v.
Newson.

The limitation of the leading case as to latent defects does not apply to the sale of a chattel where there is an implied warranty. In *Randall v. Newson* (*b*), a man bought of a coach-builder a polo for his carriage. Though the coach-builder was guilty of no negligence in the matter, the pole turned out defective and broke, frightening and injuring the horses. It was held that the coach-builder was liable.

For Lord Campbell's Act (9 & 10 Vict. c. 93), see *post*, p. 493.

Greenland
v. Chaplin.

As to the liability of a person for the consequences of his negligence, the following remark of Pollock, C. B., in the well-known contributory negligence case of *Greenland v. Chaplin* (*c*) (where an anchor fell on a steam-boat passenger) may be quoted:—"I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." See also *Hurst v.*

(*y*) *Ricketts v. East, &c., Docks and Ry. Co.* (1852), 12 C. B. 160; 21 L. J. C. P. 201; and see *Manchester, &c., Ry. Co. v. Wallis* (1854), 14 C. B. 213; 23 L. J. C. P. 85; *Buxton v. N. E. Ry. Co.* (1868), L. R. 3 Q. B. 549; 37 L. J. Q. B. 258.

(*z*) *Lax v. Darlington* (1879), 5 Ex. Div. 28; 49 L. J. Ex. 105.

(*a*) (1870), L. R. 5 Q. B. 501; 39 L. J. Q. B. 291.

(*b*) (1877), 2 Q. B. D. 102; 46 L. J. Q. B. 257.

(*c*) (1850), 5 Exch. 243; 19 L. J. Ex. 293; and see *Scott v. Shepherd*, *ante*, p. 362.

Taylor (*d*) with regard to the duty of fencing a footpath in case of diversion.

Contributory Negligence.

BUTTERFIELD *v.* FORRESTER. (1809)

[111.]

[11 EAST, 60.]

Mr. Forrester, a citizen of Derby, was engaged in the enterprise of enlarging and improving his house. This was all very well; but in carrying out his repairs he was guilty of the high-handed and unwarrantable act of putting poles across the king's highway. Just about dusk, one August evening, while things were in this improper state, Mr. Butterfield was riding home. With reckless disregard for his own and the lieges' safety, he went galloping through the streets "as fast as his horse could go"; and the reader will scarcely be surprised to hear that he rode plump up against Mr. Forrester's obstruction and had a nasty fall. He brought this action for damages; but his own careless riding was held to be as complete an obstacle to his success as Mr. Forrester's pole had been to his horse. "A party," said Lord Ellenborough, C. J., "is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it if he do not himself use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using ordinary care for himself."

(*d*) (1885), 14 Q. B. D. 918; 54 L. J. Q. B. 310; and see *Barnes v. Ward* (1850), 9 C. B. 392; 19

L. J. C. P. 195; *Hawker v. Shearer* (1887), 56 L. J. Q. B. 284.

[112.]

DAVIES *v.* MANN. (1842)

[10 M. & W. 546; 12 L. J. Ex. 10.]

The owner of a donkey fettered his forefeet, and in that helpless condition turned it into a narrow lane. The animal had not disported itself there very long when a heavy waggon belonging to the defendant came rumbling along. It was going a great deal too fast, and was not being properly looked after by its driver; the consequence was that it caught the poor beast, which could not get out of the way, and killed it. The owner of the donkey now brought an action against the owner of the waggon, and, in spite of his own stupidity, was allowed to recover, on the ground that *if the driver of the waggon had been decently careful the consequences of the plaintiff's negligence would have been averted*. "Although," said Parke, B., "the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

*Volenti
non fit
injuria.*

The doctrine of contributory negligence is based on the maxim *volenti non fit injuria*. The man who is the author of his own wrong merits nobody's sympathy; he does not come into Court with clean hands. "If," says Donat, "one goes across a public cricket-ground whilst they are playing there, and the ball being struck chances to hurt him, the person to blame is not the innocent striker of the ball, but he who imprudently sought out the danger." The most recent cases on this subject are *Thrussell v. Handyside* (1888), 20 Q. B. D. 359; 57 L. J. Q. B. 347; *Osborne v. London and North Western Ry. Co.* (1888), 21 Q. B. D. 220; 57 L. J. Q. B. 618; and *Membery v. Great Western Ry. Co.* (1889), 14 App. Ca. 179; 58 L. J. Q. B. 563.

When
plaintiff
may re-
cover in

But *Davies v. Mann* engrafts an important qualification on the rule that the negligence of the plaintiff himself disentitles him to complain of the defendant's negligence. *If the defendant by being*

ordinarily careful would have averted the consequences of the plaintiff's negligence—in other words, if the regrettable accident would never have happened if the defendant had behaved as he ought to have done—then the plaintiff is entitled to recover in spite of his negligence. A penny steamer negligently ran down a barge on the Thames. The barge had not ported, and no look-out was kept on board. But this undoubted negligence of the barge was held not such as to prevent her owners from obtaining compensation from the steam-boat people (*e*). In the river Colne, in Essex, an oyster bed was so placed as to be a public nuisance, yet its proprietors successfully went to law against a person who ran his vessel against it when he might have managed better (*f*). In a third and more recent case some colliery proprietors had a siding from the London and North Western Railway Company's line, and over the siding a bridge with a headway of eight feet. The London and North Western Railway Company negligently pushed a loaded truck eleven feet high against the bridge and broke it down. The jury found that the colliery proprietors as well as the railway company had been negligent in the matter, for they ought to have foreseen what was going to happen, as the loaded truck had been standing about some time; but in spite of this negligence they were held entitled to recover against the railway company for the damage done to the bridge, as the defendants, by the exercise of ordinary care, might have averted the mischief (*g*). spite of his negligence.
Radley's case.

The donkey case qualification may be put as correctly and more simply by saying that a plaintiff is not disentitled by his negligence unless such negligence was *the proximate cause* of the damage.

In *Davey v. L. & S. W. Ry. Co.* (*h*), which was a level crossing case, the defendants had been to a certain extent negligent, but the plaintiff was held to have been properly nonsuited, because he had been much more negligent, and it was his negligence which had mainly contributed to the accident. "Is it open," said Bowen, L. J., "to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man, who never looked at a train which was within a few feet of him?" Davey's case.

(*e*) *Tuff v. Warman* (1858), 5 C. B. N. S. 573; 27 L. J. C. P. 322.

(*f*) *Mayor of Colchester v. Brook* (1845), 7 Q. B. 339, 376; 15 L. J. Q. B. 59.

(*g*) *Radley v. L. & N. W. Ry. Co.* (1876), 1 App. Ca. 751; 46 L. J. Ex. 573; and see *Curtin v.*

G. S. & W. Ry. (1887), 22 L. R. Ir. 219.

(*h*) (1883), 12 Q. B. D. 70; 53 L. J. Q. B. 58; but see this case severely criticised in *Brown v. G. W. Ry. Co.* (1885), 52 L. T. 622.

Contributory negligence is no defence (probably) in criminal law (*i*).

Collisions
at sea.

In the case of collisions at sea, where both ships are to blame, the loss is equally apportioned between them (*k*). But in the case of the *Bywell Castle* (*l*), it was held that where one ship has by wrong manœuvring placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind. "You have no right," said James, L.J., "to expect men to be something more than ordinary men."

The
Princess
Alice
catastrophe.

Compulsory
pilotage.

It may be mentioned here that, by English law, the owner of a ship is not liable for the negligence of a pilot whom he is *compelled* to employ (*m*). If, however, as in the Suez Canal, the effect of taking the pilot on board is merely to constitute him *adviser*, while the control of the navigation of the ship is left solely with the master, the shipowner will not succeed in sheltering himself behind the compulsory pilotage (*n*).

Choice of
dangers.

It is to be observed that the defendant is not excused merely because the plaintiff, knowing of a danger caused by the defendant, voluntarily incurs an alternative danger, *e. g.*, jumps out of a train or coach to escape a collision (*o*). Nor is he excused merely because the plaintiff was doing something illegal (*p*).

"The law with regard to negligence," said Lopes, J., in *Brown v. G. W. Ry. Co.* (*q*), "has somehow or the other got into a lamentable state of confusion."

(*i*) *R. v. Swindall* (1846), 2 C. & K. 230; 2 Cox, C. C. 141.

(*k*) *The Milan* (1862), Lush, 388; 31 L. J. Adm. 105; and see *The Margaret* (1881), 6 P. D. 76; 53 L. J. Adm. 17; *The City of Manchester* (1880), 5 P. D. 221; 49 L. J. Adm. 80; and *the Stoomvaart, &c. v. The P. & O.* (1882), 7 App. Ca. 795; 52 L. J. Adm. 1.

(*l*) (1879), 4 P. D. 219; 41 L. T. 747; and see *The Farneth* (1882), 7 P. D. 207; 48 L. T. 28.

(*m*) 17 & 18 Vict. c. 104, s. 388, and see *The Clan Gordon* (1882), 7 P. D. 190; 46 L. T. 490.

(*n*) *The Guy Mannering* (1882), 7 P. D. 132; and see *The Cachapool* (1881), 7 P. D. 217; 46 L. T. 171.

(*o*) *Jones v. Boyce* (1816), 1 Stark. 493; and see *Clayards v. Dethick* (1848), 12 Q. B. 439; *Adams v. L. & Y. Ry. Co.* (1869), L. R. 4 C. P. 742; 38 L. J. C. P. 277.

(*p*) *Steele v. Buchart* (1870), 104 Mass. 59.

(*q*) *Supra*. The recent case of *Wakelin v. L. & S. W. Ry. Co.* (1886), 12 App. Ca. 41; 56 L. J. Q. B. 229, should be consulted on this subject.

Doctrine of Identification.

—◆—

WAITE *v.* NORTH EASTERN RAILWAY
CO. (1859)

[113.]

[E. B. & E. 719; 28 L. J. Q. B. 258.]

Mrs. Park and her little grandson of five years old proposed to travel by train from Velvet Hall to Tweedmouth. After taking the ticket and a half, they had to go to the opposite platform by a level crossing; and, whilst they were attempting the passage, a goods train came up unexpectedly and knocked them down. Mrs. Park was killed on the spot, but the little boy survived to go to law. The jury found that, though the railway servants were negligent in not having warned the old woman against the danger of crossing the line just then, yet the woman herself in not having kept a better look-out was guilty of such negligence as would have disentitled her to recover. No attempt was made to fix the little boy himself with negligence. It was resolved, however, that his action must fail.

The doctrine of *identification*, which this case has been supposed to illustrate, has been exploded by the decision of the House of Lords in the recent case of *Mills v. Armstrong* (*v*), but the case itself was expressly left untouched. The decision, however, may perhaps be supported upon the ground that the defendants' negligence was not the proximate cause of the injury to the plaintiff; for the cause of the accident was not the negligence of the defendants alone, but was such negligence coupled with something over which they had no control and had no reason to anticipate, namely, the negligence of Mrs. Park. Some doubt, however, may be reasonably entertained as to whether, even on this ground, the case can be said to be satisfactorily decided.

(*v*) (1888), 13 App. Ca. 1; 57 L. J. P. 65; overruling *Thorogood v. Bryan* (1849), 8 C. B. 115; 18 L. J. C. P. 336; *Armstrong v. L. & Y. Ry. Co.* (1875), L. R. 10 Ex. 47; 44 L. J. Ex. 89.

A few words may be said as to the supposed doctrine of *identification*, which for many years was adopted with approval by eminent judges.

You are driving your dog-cart, we will say, at your usual furious and improper speed through the streets of a town, and I am going out to dinner in a hansom. My driver, as it turns out,—though, of course, I did not know it when I employed him,—is drunk, and through the joint negligence of him and you, a collision occurs, and I am badly hurt. According to the formerly accepted view, I am so far identified with my drunken driver that *his contributory negligence is mine*, and I shall fail in my action against you. This theory of *identification* was, as has already been said, finally destroyed by the case of *Mills v. Armstrong* (s), where a collision having occurred between the steamships *Bushire* and *Bernina* through the fault of the masters of both, a passenger on board the *Bushire* was drowned. The representatives of the deceased brought an action *in personam* against the owners of the *Bernina* for negligence under Lord Campbell's Act, and it was held that the deceased was not identified in respect of the negligence with those navigating the *Bushire*, and so the action was maintainable (t).

Contributory Negligence of Children.

[114.]

LYNCH *v.* NURDIN. (1841)

[1 Q. B. 29; 10 L. J. Q. B. 73.]

Mr. Nurdin was an egg-merchant, and used to send his servant round Soho with a cart to deliver eggs to his customers. One day, when the man was out with the cart as usual, he imprudently left it for half an hour or so

(s) *Ubi sup.*; also reported *sub nom.* The *Bernina* (1887), 12 P. D. 58; 56 L. J. P. 38.

(t) This case was followed in *Mathews v. London Street Tramways Co.* (1889), 58 L. J. Q. B. 12; 60 L. T. 47, where it was held that the proper direction to the

jury is "Was there negligence on the part of the tramway-car driver [the defendants' servant] which caused the accident?" For if so, the fact that someone else was negligent, other than the plaintiff, is immaterial.

standing by itself in Compton Street, drawn up by the side of the pavement. While he was away, some little children began playing about the cart, climbing into it, and having all kinds of games. Amongst them was a little boy named Lynch, aged six years. He was in the act of climbing the step with a view to securing a box seat, when another mischievous little boy pulled at the horse's bridle. The horse moved on, and the little Lynch was thrown to the ground and hurt.

The child successfully brought an action for damages against the egg-merchant, it being considered that he was not guilty of contributory negligence, as he had only obeyed a child's natural instinct in playing with the cart.

It is not to be inferred from this case that a child is incapable of such contributory negligence as disentitles him from recovering. The effect of this and other cases is to establish the rule that *a child is to be judged as a child*, so that we are not to expect the same degree of care from him as from such as are of riper years; but, on the other hand, he must not get into mischief to the extent of doing *what he knows to be naughty*: if he does, he is guilty of disentitling contributory negligence. It is obvious, then, that the law does not consider it "getting into mischief" to the required extent for a child of six to play with carts left unattended in the street. "The decision in *Lynch v. Nurdin*," says Parke, B., in *Lygo v. Newbold* (*u*), "proceeded wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years; in short, that the plaintiff was blameless, and consequently that his act did not affect the question." The cases of *Abbott v. Macfie* (*x*), *Mangan v. Atterton* (*y*), and *Singleton v. Eastern Counties Ry. Co.* (*z*), may advantageously be referred to on this subject. In the first of these three cases a child of seven, playing in a Liverpool street, had pulled down on himself the covering of a cellar which the defendant had left leaning against

Child may be guilty of contributory negligence.

Lynch v. Nurdin explained in *Lygo v. Newbold*.

Pulling down flap of cellar.

(*u*) (1854), 9 Ex. 302; 23 L. J. Ex. 108; and see the American case of *Binge v. Gardiner*, 19 Conn. 507.

(*x*) (1863), 2 H. & C. 744; 33 L. J. Ex. 177; and see *Fenna v. Clare*, [1895] 1 Q. B. 199; 61 L. J.

Q. B. 238.

(*y*) (1866), L. R. 1 Ex. 239; 35 L. J. Ex. 161. See *Ponting v. Noakes*, [1891] 2 Q. B. 281; 63 L. J. Q. B. 519.

(*z*) (1859), 7 C. B. N. S. 287.

Playing
with
crushing
oil-cake
machine.

Single-
ton's case.

Contri-
butory
negligence
of parents.

a wall. It was held that he could not recover. In *Mangan v. Atterton* a Sheffield whitesmith left a machine for crushing oil-cake standing about in the street, without fastening up the handle or taking any other precaution. Forth there came bounding from the school just then the plaintiff, a little boy of four, his brother, aged seven, and some other boys. They instantly collected round the Sheffield gentleman's machine; one of them turned the handle; and then, by the direction of his brother, the plaintiff put his fingers in the cogs. The result of this scientific experiment was an action against the owner of the machine. But judgment was given for the defendant, on the double ground that he had not been negligent, and that the little boy had been (*a*). In the third case a little girl of three was trespassing on a railway. She was sitting on the parapet of a small wooden bridge when a train came up and cut off one or two of her legs. The driver had seen the child, but made no attempt to stop the engine, contenting himself with whistling. It was held that the child could not recover damages against the company,—rather, however, because they had not been negligent at all, than because the plaintiff had been guilty of such contributory negligence as prevented her from availing herself of the defendants' negligence.

In the American leading case of *Hartfield v. Roper* (1839), 21 Wend. 615, the defendant, driving a sleigh without bells, had negligently run down a child of two playing about in a street by itself. In an action by the child it was held that *the negligence of its parents in allowing it to wander unattended in a public road* was an answer. But the rule which visits the negligence of the fathers on the children in this way is denied in some of the States of the Union, and has not yet been adopted by the English Courts (*b*).

(*a*) This case, however, will be found severely criticised by Cockburn, C.J., in *Clark v. Chambers* (1878), 3 Q. B. D. 339; 47 L. J. Q. B. 427.

(*b*) See, however, the Scotch cases of *Davidson v. Monkland Ry. Co.*, 27 Jur. 541; *Lumsden v. Russell*, 28 Jur. 181; *Balfour v. Baird*, 30 Jur. 124.

*Position of Plaintiff in regard to Defendant's
Negligence.*

INDERMAUR *v.* DAMES. (1867)

[115.]

[L. R. 2 C. P. 311; 36 L. J. C. P. 181.]

Mr. Dames was the owner of a sugar refinery, and employed one Duckham, a gas engineer, to improve his gas-meter. Duckham got his work done by a certain Saturday evening; but it was arranged that he or one of his workmen should come on the following Tuesday to see if the improvement was working satisfactorily. Accordingly on the Tuesday the plaintiff, Indermaur, presented himself as Duckham's representative to look at the gas-meter. Now it happened that on the premises, and level with the floor, there was an unfenced shaft used for the purpose of hauling up bales of sugar. When the shaft was being used for that purpose it was usual and necessary that it should be unfenced; but when not being used there was no particular reason why it should not be fenced. Indermaur fell through this shaft, and brought an action for personal injuries. The sugar people denied their liability to him, contending that he was a mere licensee, and that they were under no particular duty towards him. It was held, however, that he was *not* a mere licensee, as he had come on lawful business, and that as the hole was from its nature unreasonably dangerous to persons not usually employed on the premises, they were liable.

When a person is injured on somebody else's land, and by that somebody's negligence, the question is a very material one—*What was he doing there?*

1. He may have been a *trespasser*. If so, he cannot, as a rule, recover damages. But there are exceptions. For instance, though

Tres-
passers.

Dangerous pit. a man has a right, as against trespassers, to have a dangerous pit *in the middle of his field*, he has no right to have one *within twenty-five yards of the road*(c). See also the Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), which declares an insufficiently fenced quarry, within fifty yards of a highway or place of public resort, to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875. Bird v. Holbrook(d) is a well-known authority on this subject. There the defendant, having had some valuable flowers and roots stolen from his garden, which was at some distance from his house, had set a spring-gun. The plaintiff climbed a wall, during the day-time, in pursuit of the stray fowl of a friend, and got shot. In spite of the plaintiff being thus a trespasser, it was held that the defendant was liable in damages. "There is no act," said Best, C. J., "which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England. I am, therefore, clearly of opinion, that he who sets spring-guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer."

24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. IV. c. 18), makes it a misdemeanour to set spring-guns or man-traps, unless it be for the purpose of protecting one's house at night, or of destroying vermin.

Murley v. Grove. But in the recent case of Murley v. Grove(e), the defendant, while erecting houses upon land adjoining a new road which had not been dedicated to the public, had dug a trench across the road for the purpose of making drains. The plaintiff's servant, while driving the plaintiff's horses along the road after dark, drove into the trench, there being no lights. It was held that the plaintiff could not recover damages, there being no duty cast on the defendant to protect anyone using the road without permission.

Licenses. 2. The plaintiff may have been a *licensee*.

Going out to dinner. In this position are guests. Whenever you go out to dinner, or are stopping with a friend, you are a licensee; and, in respect of the ability to bring an action against your host for his negligence, you are little better than a trespasser. "*A lady with a valuable*

(c) 5 & 6 Will. IV. c. 50, s. 70; and see Barnes v. Ward (1850), 9 C. B. 392; 19 L. J. C. P. 195; Hounsell v. Smith (1860), 7 C. B. N. S. 731; 29 L. J. C. P. 203.

(d) (1828), 4 Bing. 628; 1 M. & P. 607; and see Hott v. Wilkes (1820), 3 B. & Ald. 304; Jordin v.

Crump (1841), 8 M. & W. 782; 5 Jur. 1113.

(e) (1882), 46 J. P. 360. "*As to the dictum in Gallagher v. Humphrey*," said Cave, J., "*I cannot think that Crompton, J., can have been correctly reported.*"

dress goes out to dinner, and the servant, in handing the soup, negligently spoils her dress: will an action lie against the master ?" (f).

A licensee can only maintain an action against his licensor when the danger through which he has sustained hurt was of a *latent* character, which the licensor knew of and the licensee did not.

Concealed danger.

A gentleman was once leaving a friend's house after paying a call when a loose pane of glass fell from the door as he was pushing it open, and cut him badly ; but it was held that he could not recover damages (g). "Where a person," said Bramwell, B., "is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury ; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any *act of commission*. If a person asked another to walk in his garden, in which he had placed spring-guns or man-traps, and the latter, not being aware of it, was thereby injured, that would be an act of *commission*. But if a person asked a visitor to sleep at his house, and omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of *commission*, but simply an act of *omission*" (h).

Southcote v. Stanley.

In the recent case of *Burchell v. Hickisson* (i) the plaintiff was a little boy of four, who one day accompanied his sister to the defendant's house, where she was going on business. The girl went up the defendant's steps all right, but the little boy tumbled through a gap in some railings out of repair into the area below. It was held that the action could not be maintained, as the little boy's position could be placed no higher than that he was there lawfully, and was not a trespasser ; and, that being so, the only duty on the part of the defendant towards him was to take care that there was *no concealed danger*, and of this there was no evidence.

Little boy falling into area.

In *Ivay v. Hedges* (k) the defendant was the landlord of a house at Wapping, which was let out in apartments to several tenants, each of whom had the privilege of using the roof for the purpose of linen-drying. On an accident happening, it was held that the mere licence so given imposed no duty on the defendant to fence.

Use of roof for drying linen.

(f) Per Pollock, C.B., in *Southcote v. Stanley* (1856), 1 H. & N. 247 ; 25 L. J. Ex. 339.

(g) *Southcote v. Stanley*, *supra*. The plaintiff appears really to have been staying at the defendant's hotel as a customer ; but if so, that fact was not brought out by the

pleadings.

(h) The soundness, however, of this distinction between *commission* and *omission* is not beyond question. See Smith on Negligence, p. 31.

(i) (1880), 50 L. J. C. P. 101.

(k) (1882), 9 Q. B. D. 80.

Batchelor *v.* Fortescue. So in *Batchelor v. Fortescue* (1), a plaintiff suing under Lord Campbell's Act, was held to be disentitled to complain of the defendant's negligence (even if she could show it, which she could not), because her husband was only a bare licensee at the most when he met with his death. He had been employed to guard some unfinished buildings, and wandered needlessly to a place where the defendant's workmen were carrying out some excavations, when a chain broke, and he was killed. "There was no evidence," said Brett, M.R., "to show that the defendant's workmen had reason to expect the deceased to be at the spot where he met with his death. There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place."

Other cases. The cases of *Corby v. Hill* (1858), 4 C. B. N. S. 556; 27 L. J. C. P. 318; *Gautret v. Egerton* (1867), L. R. 2 C. P. 371; 36 L. J. C. P. 191; *Bolch v. Smith* (1862), 7 H. & N. 736; 31 L. J. Ex. 201; *Moffatt v. Bateman* (1869), L. R. 3 P. C. 115; 22 L. T. 140; and *Wilkinson v. Fairrie* (1862), 32 L. J. Ex. 173; 1 H. & C. 633; may also be referred to on the question as to when a licensee can successfully sue.

On lawful business. 3. The plaintiff may have been *on lawful business*.

And this is the best position of all to be in, the rule being that where a person is upon premises by the invitation or permission of the occupier, on lawful business in which both he and the occupier have an interest, there is a duty towards such person cast upon the occupier to keep the premises in a reasonably secure condition. Our friend Indermaur was considered to be in this position; and so, in later cases, where a licensed waterman, who went on board a barge on the Thames to complain of its illegal navigation and get employment if he could (*m*), and a customer at an inn on whom the ceiling of one of the rooms fell (*n*).

Thames waterman.

Guest at inn.

Elliott v. Hall.

In *Elliott v. Hall* (*o*), the defendant, a colliery owner, had consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state, and the consequence was that injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coals, and had got

(1) (1883), 11 Q. B. D. 474; 49 L. T. 644.

(*m*) *White v. France* (1877), 2 C. P. D. 308; 46 L. J. C. P. 823.

(*n*) *Sandys v. Florence* (1878), 47

L. J. C. P. 598. But see *Walker v. Midland Ry. Co.* (1886), 55 L. T. 489; 51 J. P. 116.

(*o*) (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518.

into the truck for that purpose. It was held that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck, and that he was liable. "This seems to me," said Grove, J., "a much stronger case than *Heaven v. Pender* (*p*), where it was held that the defendant was liable. *Indermaur v. Dames*, also, does not seem to me so strong a case as this. This is not the mere case of a person lawfully coming into premises for the purposes of business, but the defendant must have known that the plaintiff must necessarily get into the truck for the purpose of unloading the coal. The only case that seems somewhat in the defendant's favour is the case of *Collis v. Selden* (*q*), where it was alleged that the defendant improperly and negligently hung a chandelier in a public-house. . . . But I do not think that that case is really an authority which bears upon the circumstances of the present case."

The reader should also refer, on this branch of the subject, to *Smith v. London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326; 37 L. J. C. P. 217; *O'Neil v. Everest* (1892), 61 L. J. Q. B. 453; 66 L. T. 396; *Chapman v. Rothwell* (1858), E. B. & E. 168; 27 L. J. Q. B. 315; *Nicholson v. Lanc. and Yorkshire Ry. Co.* (1865), 34 L. J. Ex. 84; 3 H. & C. 534; *Holmes v. N. E. Ry. Co.* (1871), L. R. 6 Ex. 123; 40 L. J. Ex. 121; *Martin v. G. N. Ry. Co.* (1855), 24 L. J. C. P. 209; 16 C. B. 179; *Burgess v. G. W. Ry. Co.* (1875), 32 L. T. 76; *Wright v. L. & N. W. Ry. Co.* (1875), 1 Q. B. D. 252; 45 L. J. Q. B. 570; *Jewson v. Gatti* (1885), 1 C. & E. 564; *Sandford v. Clarke* (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; and *Miller v. Hancock*, [1893] 2 Q. B. 177; 69 L. T. 214.

Actions against Surveyors of Highways, &c.

MCKINNON *v.* PENSON. (1854)

[116.]

[9 EXCH. 609; 23 L. J. M. C. 97.]

This was an action against the surveyor of county bridges for the county of Cardigan. One of his bridges was so much out of repair that the plaintiff's carriage was

(*p*) (1853), 11 Q. B. D. 503; 52 L. J. Q. B. 702.

(*q*) (1868), L. R. 3 C. P. 445; 37 L. J. C. P. 232.

43 Geo.
III. c. 59.

pitched into the river. In suing for the damage thus done, the plaintiff practically admitted that the action could not be maintained at common law, but he relied on a certain Act of Parliament passed rather late in George the Third's reign, which, in his view, gave him a right of action. It was held, however, that the statute did not alter the common law in this respect, and that the action, therefore, could not be maintained.

The Men
of Devon.

In 1788, in the case of *Russell v. The Men of Devon (r)*, it had been held that no action would lie by an individual against the inhabitants of a county for an injury sustained in consequence of a bridge being out of repair. "It is better," said Ashhurst, J., "that an individual should sustain an injury than that the public should suffer an inconvenience."

Young v.
Davis.

The leading case was followed a few years later in *Young v. Davis (s)*, which was an action by a foot passenger against some Oxfordshire surveyors of highways for allowing a highway to be out of repair, whereby the plaintiff fell into a hole. "It appears to me," said Pollock, C. B., in that case, "if the plaintiff is to succeed, that it would be enlarging the sphere of legislation very much, and rendering it impossible to get anybody to discharge the duties of surveyor of highways; because we all know what will be the practical result. A surveyor of highways will become a sort of insurer of everyone travelling along the road, and not a single accident will happen without an action being brought." But although a surveyor is not liable for *non-feasance*, he is for *mis-feasance*. Two or three years ago a vestry ordered their surveyor to get the level of a road raised. The surveyor, accordingly, employed a contractor for the labour part of the job, but made no agreement with him as to fencing or lighting, and reserved to himself the superintendence. The plaintiff driving along the road one night in his dog-cart was upset through not seeing the obstruction, and it was held that the surveyor was liable to him (*t*).

Distinc-
tion be-
tween mis-
feasance
and non-
feasance.

Waterers
as well as
surveyors.

Moreover, surveyors of highways may be liable as having acted *in some other capacity*. In a recent case (*u*), the plaintiff, whilst

(*r*) (1788). 2 T. R. 667.

(*s*) (1863). 2 H. & C. 197; 9 L. T. 145.

(*t*) *Pendlebury v. Greenhalgh* (1875), 1 Q. B. D. 36; 45 L. J. Q. B. 2; and see *Foreman v. Mayor*

of Canterbury (1871), L. R. 6 Q. B. 214; 40 L. J. Q. B. 138; *Hardcastle v. Bielby*, [1892] 1 Q. B. 709; 61 L. J. M. C. 101.

(*u*) *Blackmore v. Vestry of Mile End Old Town* (1882), 9 Q. B. D.

walking in Charles Street, Stepney, fell over the iron-flap cover to a water-meter box which was imbedded in the pavement, and had worn smooth by traffic, and broke his leg. "The question to be considered," said Cotton, L. J., "is whether the iron flap was laid down by the defendants as surveyors of highways or in a different capacity and under a different authority, so as to make them liable. It is clear that it was put down by the defendants *as waterers of the highway*," i.e., under sect. 116 of the Metropolitan Local Management Act, 1855 (x).

The fact that a local authority has the control of the sewers as well as of the highways does not render such local authority liable for an accident which is attributable solely to the non-repair of the highway. Thus, in the recent case of *Thompson v. Mayor, &c. of Brighton* (y), the plaintiff was riding along a public road in Brighton, when his horse's foot struck the cover of a man-hole in the middle of the road, which projected about one and a half inches above the surface of the road, and the horse was thrown down and seriously injured. The man-hole had been inserted in the road by the corporation of Brighton as the sewer authority. It was a proper cover, and there was no fault in its construction, nor was it at all out of repair. The accident arose from the road not having been kept up to its level by the corporation, who were the road authority. Under these circumstances the Brighton corporation were held not liable, as the only breach of duty which could be imputed to them was their omission to repair the road.

In *Burgess v. The Northwich Local Board* (z) the action was by some owners of houses abutting on a highway which was vested in the defendants, a local board acting under 38 & 39 Vict. c. 55 (the Public Health Act, 1875), and having the powers and liabilities of surveyors of highways. The abstraction of salt had caused a subsidence of the ground, and the defendants found it necessary to raise the road. To meet the new level of the road, the plaintiffs raised their houses: and now claimed compensation under sect. 308 of the Act. It was held, however, that as the highway was vested

Sewer as well as board authorities.

A sinking town.

451; 51 L. J. Q. B. 496; following *White v. Hindley Local Board* (1875), L. R. 10 Q. B. 219; 41 L. J. Q. B. 118.

(x) 18 & 19 Vict. c. 120.

(y) [1891] 1 Q. B. 332; 63 L. J. Q. B. 181; see, too, *Oliver v. Horsham Local Board*, *ibid.*; overruling *Kent v. Worthing Local Board* (1882), 10 Q. B. D. 115; 52 L. J. Q. B. 77. See also *Cowley v. Newmarket Local Board*, [1892] A. C. 345; 62

L. J. Q. B. 65; *Pieton Municipality v. Geldert*, [1893] A. C. 524; 63 L. J. P. C. 37; and *Sydney Municipality v. Bourke*, [1895] A. C. 433; 11 T. L. R. 403, overruling *Hartnall v. Ryde Commissioners* (1863), 4 B. & S. 361; 33 L. J. Q. B. 39, and explaining *Bathurst v. Macpherson* (1879), 4 App. Cas. 256; 48 L. J. P. C. 61. (1880), 6 Q. B. D. 264; 59 L. J. Q. B. 219.

in the defendants, no action of trespass could have been maintained by the plaintiffs even if more materials had been placed on the road than a surveyor of highways could justify, and that the plaintiffs had no right to have the road maintained at the level to which it had accidentally and recently sunk; and that the works of the defendants were not done "in exercise of any of the powers" of the Act within section 308, but were done, if not strictly in pursuance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors of highways have; and consequently, that the plaintiffs were not entitled to compensation.

Liability of surveyor for materials supplied. A surveyor of highways who, in accordance with the provisions of the Highway Act, 1835 (5 & 6 Will. IV. c. 50), contracts for the purchase of materials to be used in the repair of the parish roads, and raises the necessary sum by the levy of a highway rate, is personally and solely liable for payment; and, consequently, his successor in office is not liable therefor, although such materials were, in fact, used in repairing the roads (*a*).

Liability of public bodies generally. As to the liability of public officers other than surveyors of highways, the following rule from Addison on Torts (*b*) may be quoted:—"Whenever an Act of Parliament imposes upon commissioners, or upon any public body, the duty of maintaining or repairing any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such commissioners or public body, unless there are provisions in the statutes creating them for limiting their liability, or the duty of repairing is not absolute; the rule being that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creation of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things; and this whether they have or have not funds at their disposal for effecting the repairs; though, if there are no funds, there may be a difficulty in the way of the plaintiff's getting his damages."

Other cases. The reader is also recommended to refer to the following cases:—*Olby v. Ryde Commissioners* (1864), 5 B. & S. 743; 33 L. J. Q. B. 296; *Forbes v. Lee Conservancy Board* (1879), 4 Ex. D. 116; 48 L. J. Ex. 402; *Gibson v. Mayor of Preston* (1870), L. R. 5 Q. B. 218; 39 L. J. Q. B. 131; *Parsons v. St. Matthew* (1867), L. R. 3 C. P. 56; 37 L. J. C. P. 62; *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; 35 L. J. Ex. 225; *Parnaby v. Lancaster Canal*

(*a*) *Frodingham Iron Co. v. L. J. Q. B. 12.*
Bowser, [1891] 2 Q. B. 791; 64 (*b*) 6th ed. p. 723.

Co. (1839), 11 A. & E. 223; *Howitt v. Nottingham Tramways Co.* (1883), 12 Q. B. D. 16; *Barham v. Ipswich Docks Commissioners* (1885), 54 L. T. 23.

A word may be said about the liability of the Hundred or other area to make compensation for damage done by rioters. The statute to be consulted is the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), which repealed 7 & 8 Geo. IV. c. 31, and 2 & 3 Will. IV. c. 72, and gave a right to compensation to persons whose buildings are injured or destroyed, or property therein injured, stolen, or destroyed in a riot. In fixing the amount of compensation (which is paid out of the district police rate) regard is had to the conduct of the claimant, whether as respects the precautions taken by him, or as respects his being a party or accessory to the riotous or tumultuous assembly, or as regards any provocation offered to the persons assembled or otherwise. It may be noted that churches, chapels, schools, hospitals, public institutions, and public buildings, are within the provisions of the Act. In the case of churches or chapels, the persons to recover the compensation are the church-wardens or chapel-wardens, if any, or, if there are none, the persons having the management of the church or chapel, or the persons in whom the legal estate in the same is vested; and in the case of schools, hospitals, or other public institutions, then the person in whom the legal estate in the same is vested (*c*).

Damage by rioters.
Riot Act, 1886.

Servant Suing Master for Injury during Service.

PRIESTLEY v. FOWLER. (1837)

[117.]

[3 M. & W. 1; M. & H. 305.]

Fowler was a butcher, and Priestley was his man. It was Priestley's duty to take meat round in a van to the various customers. These seem to have been pretty numerous, for one day such a quantity of shoulders of mutton and rounds of beef were put on board that the van broke down, and Priestley's thigh was fractured. The unfortunate butcher-boy now brought an action against his

master, but it was held that the action did not lie. "The servant," said the Court, "is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

[118.]

MELLORS *v.* SHAW. (1861)

[30 L. J. Q. B. 333; 1 B. & S. 437.]

This was an action by a miner against his masters, the proprietors of the mine. The sides of the shaft had been left in an unsafe condition, and in consequence some of the "bind" fell on the man's head and injured him severely. The plaintiff was ignorant of the danger under which he was working, but one of the defendants, being the superintendent of the mine, was of course aware of it. On these facts it was held that the action could be maintained.

Common
employ-
ment.
General
rule.

As a rule, a servant cannot bring an action against his master for an injury sustained in the course of the service. All the ordinary risks of the service, including the risk of one of his fellow-servants engaged in a common employment negligently causing him an injury, he is taken to have contemplated at the time of the contract, and to have made allowance for in his wages (*d*).

Excep-
tions.

Until 1880 there were not many exceptions to this rule. But it was the master's duty to take reasonable precautions to insure the safety of his servants. Thus, if he had omitted to provide competent fellow-servants, or safe and efficient machinery, or if his

(*d*) See *Wigmore v. Jay* (1850), 5 Ex. 354; 19 L. J. Ex. 300; *Charles v. Taylor* (1878), 3 C. P. D. 492; 38 L. T. 773; *Wilson v. Merry* (1868), L. R. 1 Sc. App. 326; 19 L. T. 39; *Swainson v. N. E. Ry. Co.* (1878), 3 Ex. D. 341; 47 L. J. Ex. 372; *Morgan v. Vale of Neath*

Ry. Co. (1865), L. R. 1 Q. B. 149; 35 L. J. Q. B. 23; *Johnson v. Lindsay*, [1891] A. C. 371; 65 L. T. 97; *Cameron v. Nystrom*, [1893] A. C. 308; 62 L. J. P. C. 85; *Hedley v. Pinkney Steamship Co.*, [1894] A. C. 222; 63 L. J. Q. B. 419.

own personal negligence—or even that of a person who might be regarded as a deputy master—had brought about the accident, he was not exempt from liability; unless indeed where, as in the case of a servant being very well aware of the dangerous machinery he was working with, the maxim *volenti non fit injuria* had application (e).

Though the doctrine of common employment has not by any means been abolished yet,—whether such a consummation is to be wished or not,—the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), gives "*workmen*" increased rights of action against their masters for personal injuries sustained during the service. "As far back," says Mr. Justice Cave, in his very clear judgment in *Griffiths v. The Earl of Dudley* (f), "as the date of the decision in *Priestley v. Fowler*, the law was that the workman could not recover for injuries sustained by him through the negligence of a fellow-servant. In *Priestley v. Fowler* this rule was said to be founded upon an implied contract between master and workman that the master should not be liable. The Courts of common law have always felt hesitation in holding that there could be any right of action otherwise than arising out of contract or tort. They therefore applied the doctrine of implied contract, the effect of which, so far as a man's legal liability was concerned, was much the same as if there had been an express contract. The doctrine was extended by *Wilson v. Merry* (g) to injuries caused to a workman by a foreman or person occupying a position of superintendence in the same employment. The Employers' Liability Act was passed to remove the difficulty arising from the decision in *Wilson v. Merry*. The effect of it is that the workman may bring his action in five specified cases, and the employer shall not be able to say in answer that the plaintiff occupied the position of workman in his service, and must therefore be taken to have impliedly contracted not to hold the employer liable. In other words, the legal result of the plaintiff being a workman shall not be that he has impliedly contracted to bear the risks of the employment."

Let us proceed to consider the cases in which this new Act gives a workman the right to sue his employer.

Employers' Liability Act, 1880.

Historical review by Mr. Justice Cave.

Rights of workmen under Act of 1880.

(e) See *Murphy v. Smith* (1865), 19 C. B. N. S. 361; 12 L. T. 605; *Ashworth v. Stanwix* (1861), 30 L. J. Q. B. 183; *Webb v. Tarrant* (1856), 18 C. B. 797; *Allen v. New Gas Co.* (1876), 1 Ex. D. 251; 15 L. J. Ex. 668; *Woodley v. Met. Ry. Co.* (1877), 2 Ex. D. 381; 46

L. J. Ex. 521; *Senior v. Ward* (1859), 1 E. & E. 385; 28 L. J. Q. B. 139.

(f) (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 513.

(g) (1868), L. R. 1 H. L. Sc. 326; 19 L. T. 30.

The first question is, Who is a "workman"? The 8th section of the Act says—

"Work-
man."

"The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875 (*h*), applies." The guard of a goods train, however, has very recently been held not to be a "workman" within the meaning of the Act (*i*).

Turning to the Act referred to, we find that

"The expression 'workman' does not include a domestic or menial servant (*h*), but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Sect. 13 provides that the Act "shall not apply to seamen, or to apprentices to the sea service."

The term "workman," as above defined, includes one who has contracted personally to execute manual work, although he is assisted by others whom he selects and pays (*l*). But in *Morgan v. London General Omnibus Co.* (*m*), it was held that the conductor of an omnibus was not entitled to the benefit of the Employers' Liability Act. "I cannot think," said Brett, M.R., "that he falls within any of the classes enumerated; he is not 'engaged in manual labour,' he does not lift the passengers into and out of the omnibus; it is true that he may help to change the horses, but his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the passengers as their fares; in fact, he earns the wages becoming due to him through the confidence reposed in his honesty." The driver of a tramcar, too, has been held not to be entitled to the benefit of the Act (*n*); but the driver of a cart, which he helped to load and unload, in the employment of a wharfinger who, for the purposes

(*h*) 38 & 39 Viet. c. 90.

(*i*) *Hunt v. G. N. Ry. Co.*, [1891] 1 Q. B. 601; 60 L. J. Q. B. 216.

(*k*) A potman in a public-house is not a "workman," as his duties are substantially of a menial or domestic nature; *Pearce v. Lansdowne* (1893), 62 L. J. Q. B. 411; 69 L. T. 316.

(*l*) *Grainger v. Aynsley*, and *Bromley v. Tams* (1880), 6 Q. B. D.

182; 50 L. J. M. C. 48.

(*m*) (1884), 13 Q. B. D. 832; 53 L. J. Q. B. 352; and see *Jackson v. Hill* (1884), 13 Q. B. D. 618; 49 J. P. 118; *Brown v. Butterley Coal Co.* (1885), 53 L. T. 964; 50 J. P. 230.

(*n*) *Cook v. North Metropolitan Tramways Co.* (1887), 18 Q. B. D. 683; 56 L. J. Q. B. 309.

of his business, is the owner of carts and horses, is a "workman" within the Act (*o*). In the recent case of *Bound v. Lawrence*, Grantham, J., and Smith, J., differed as to whether a grocer's shop assistant was a "workman"; his duties comprised serving customers in the shop from behind the counter, writing down their orders, making up parcels of goods, carrying parcels up to eighty-four pounds weight to the cart at the door from the shop, occasionally carrying sides of bacon from the shop door, where hanging, into the shop, each Monday bringing from the cellar bags of sugar, boxes of soap, and sides of bacon, occasionally assisting at the pulley in getting up goods from the cellar, and occasionally wheeling goods in a truck from the warehouse to the shop. But the Court of Appeal held that he was *not* a "workman" within the meaning of the Act, as the manual labour was only incidental and accessory to his real and substantial employment, which was that of a salesman (*p*).

If the workman has been hurt through a preventible defect in the condition of the *ways, works, machinery, or plant* used in his master's business (*q*); or through the negligence of a *superintendent* (*r*); or of *any fellow-servant whose orders he had to obey*, and

(*q*) *Yarmouth v. France* (1887), 19 Q. B. D. 647; 57 L. J. Q. B. 7.

(*p*) [1892] 1 Q. B. 226; 61 L. J. M. C. 21.

(*q*) The Act applies to the case of plant being unfit for the purpose for which it is used, though no part of it is shown to be unsound. See *Smith v. Baker*, [1891] A. C. 325; 60 L. J. Q. B. 683. In *Cripps v. Judge* (1884), 13 Q. B. D. 583; 53 L. J. Q. B. 517, the plaintiff had been injured by the breaking of a ladder, which may have been good enough for ordinary purposes, but which was insufficient for the particular purpose for which it was being used, and he was held entitled to recover. *Heske v. Samuelson* (1883), 12 Q. B. D. 30; 53 L. J. Q. B. 45, being approved and followed. See also *Corcoran v. East Surrey Ironworks Co.* (1888), 58 L. J. Q. B. 145; *Moore v. Gimson* (1889), 58 L. J. Q. B. 169; *Morgan v. Hutchins* (1890), 59 L. J. Q. B. 197; 38 W. R. 412; *Braunigian v. Robinson*, [1892] 1 Q. B. 344; 61 L. J. Q. B. 202. But in *McGiffin v. Palmer's Shipbuilding Co.* (1882), 10 Q. B. D. 5; 52 L. J. Q. B. 25,

it was held that "any defect in the condition of the ways" meant a defect of a permanent or quasi-permanent nature, so that an action could not be brought for an injury caused by a piece of iron having been negligently left projecting into the roadway. See also *Paley v. Garnett* (1885), 16 Q. B. D. 52; 34 W. R. 295; *Howe v. Finch* (1886), 17 Q. B. D. 187; 34 W. R. 593; *Pegram v. Dixon* (1886), 55 L. J. Q. B. 447; 51 J. P. 198; *Walsh v. Whiteley* (1888), 21 Q. B. D. 371; 57 L. J. Q. B. 586; *Willetts v. Watt*, [1892] 2 Q. B. 92; 61 L. J. Q. B. 540. Defect in the condition of machinery includes the absence of proper means to secure safety in the operation for which the machinery is used: *Stanton v. Scrutton* (1893), 62 L. J. Q. B. 405; 5 R. 244.

(*r*) In *Osborne v. Jackson* (1883), 11 Q. B. D. 619; 48 L. T. 612, it was held that a man might be "in the exercise of superintendence," though at the time voluntarily assisting in manual labour; and *Shaffers v. General Steam Navigation Co.* (1883), 10 Q. B. D. 356; 52

was obeying, at the time of the accident(s); or through a fellow-servant's obedience to *stupid rules or instructions* of his master (t); or through the negligence of a fellow-servant having the charge or control of any *signal, points, locomotive engines, or train upon a railway* (v); in all these cases, the workman (or, if he dies, his representatives) may sue his employer for compensation (x). If, however, he was previously aware of the defect or negligence which caused the injury, he must have told his master about it, or he will be out of Court altogether (y). The defence based upon the maxim

L. J. Q. B. 260, was distinguished on the ground that "the negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident."

(s) See *Millward v. Midland Railway Co.* (1884), 14 Q. B. D. 68; 54 L. J. Q. B. 202, where the plaintiff, a boy of 14, employed by a railway company as a van guard, had met with an accident (iron window frames falling on him) through obeying the directions of the driver, and was allowed to recover. But see also *Bunker v. the same railway company* (1882), where another boy who had done what his foreman told him to do was less fortunate in his litigation. "In this particular instance," said the Court, "the plaintiff, being under the age of 15, knew that by the rules of the defendant company he was not allowed to drive; he therefore was not bound to obey this order, as the foreman was not a person to compel his obedience to it." (47 L. T. 476; 31 W. R. 231.) See also *Kellard v. Rooke* (1888), 21 Q. B. D. 367; 57 L. J. Q. B. 599; *Ray v. Wallis* (1887), 51 J. P. 519; *Howard v. Bennett* (1888), 58 L. J. Q. B. 129; 60 L. T. 152; *Snowden v. Baynes* (1890), 25 Q. B. D. 193; 59 L. J. Q. B. 325; and *Wild v. Waygood*, [1892] 1 Q. B. 783; 61 L. J. Q. B. 391; where it was held that in order to establish liability under sect. 1, sub-sect. 3 of the Act, it is not necessary that conformity to the order should be the *causa causans* of the injury, though there must be an intimate connection between the negligence, the injury, and the

conformity to the order.

(t) Rules or bye-laws having the *sanction of a government department* cannot be objected to as improper or defective.—Sect. 2, sub-s. 2. And see *Whatley v. Holloway* (1890), 62 L. T. 639; 54 J. P. 645; *Baddeley v. Granville* (1887), 19 Q. B. D. 423; 56 L. J. Q. B. 501.

(v) The term "railway" applies to a temporary railway laid down by a contractor for the purposes of the construction of works: *Doughty v. Firbank* (1883), 10 Q. B. D. 358; 52 L. J. Q. B. 480. But a steam crane, fixed on a trolley and propelled by steam along a set of rails, is not "a locomotive engine" within the section: *Murphy v. Wilson* (1883), 52 L. J. Q. B. 524; 48 L. T. 788. Trucks upon a siding in a goods yard are "upon a railway," for the sidings form a part of the line: *Cox v. G. W. Ry. Co.* (1882), 9 Q. B. D. 106; 39 W. R. 816. In *Gibbs v. G. W. Ry. Co.* (1884), 12 Q. B. D. 208; 53 L. J. Q. B. 513, it was held that a person who was employed by a railway company to clean, oil, and adjust the points was not a "person having the charge or control" of them.

(x) Sect. 1; and see *Robins v. Cubitt* (1881), 46 L. T. 535.

(y) Sect. 2, sub-s. 3; and see *Stuart v. Evans* (1883), 31 W. R. 706; 49 L. T. 138; *Webbin v. Ballard* (1886), 17 Q. B. D. 122; 24 W. R. 455; *Griffiths v. London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259; *Martin v. Connah's Quay Alkali Co.* (1885), 33 W. R. 216. In the last-mentioned case a waggon was in a defective state, of which the plaintiff was

"*culenti non fit injuria*" is not affected by the Employers' Liability Act, 1880 (z).

Written (a) notice (which, however, may be excused on good grounds in case of death), *giving the name and address of the person injured, and stating in ordinary language the cause and date of the injury*, must be served (b) on the employer within six weeks, and the action must be commenced (in the county court, unless removed (c) on the application of either party) within six months of the accident. In the case of death, the action may be commenced any time within twelve months from the time of death (d).

Defects and inaccuracies in the notice required by the Act are of no consequence unless the judge before whom the case is tried believes two things, viz., *first*, that the defendant is prejudiced in his defence by the bad notice, and *secondly*, that the defect or inaccuracy was not the result of accident or ignorance, but was for the express purpose of misleading (e). Moreover, "the notice is supposed to be given by a person in a humble sphere of life, and not possessed of much knowledge. It is to be written in 'ordinary language,' that is, the party is to use his own untutored language. If it is to be construed with vigorous strictness, the Act will be made nugatory" (f).

Conditions of suing under Act of 1880.

Inaccurate notices.

aware, and he used it in such a way as to cause injury to himself when he knew how to use it and might have used it so as not to cause injury to himself. See also *McEvoy v. Waterford Steamship Co.* (1886), 18 L. R. Ir. 159.

(z) *Thomas v. Quartermaine* (1887), 18 Q. B. D. 685; 56 L. J. Q. B. 340. As to the meaning of this maxim, the following cases also should be consulted, namely: *Yarmouth v. France* (1887), 19 Q. B. D. 617; 57 L. J. Q. B. 7; *Thruswell v. Handyside* (1888), 20 Q. B. D. 359; 57 L. J. Q. B. 317; *Members v. Great Western Ry. Co.* (1889), 14 App. Cas. 179; 58 L. J. Q. B. 563; and *Smith v. Baker*, [1891] A. C. 325; 60 L. J. Q. B. 683.

(a) *Moyle v. Jenkins* (1881), 8 Q. B. D. 116; 51 L. J. Q. B. 112; and see *Keen v. Millwall Dock Co.* (1882), 8 Q. B. D. 482; 51 L. J. Q. B. 277. The notice may probably be contained in several documents.

(b) As to mode of service, see

Adams v. Nightingale (1882), 72 L. T. 424.

(c) An action may be removed into the Superior Court (1) by *certiorari*, (2) by order of the High Court, or (3) by order of the county court where it turns out that the amount is beyond the jurisdiction of the county court. See the recent case of *Munday v. Thames Ironworks, &c. Co.* (1882), 10 Q. B. D. 59; 47 L. T. 351.

(d) Sects. 4 and 7.

(e) Sect. 7. In *Carter v. Drysdale* (1883), 12 Q. B. D. 91; 32 W. R. 171, the plaintiff's notice did not give the date of the injury, but the omission was held to be of no consequence. See also *Beckett v. Manchester Corporation* (1888), 52 J. P. 346; *Previti v. Gatti* (1888), 58 L. T. 762; 36 W. R. 670.

(f) *Per Cave, J.*, in *Stoner v. Hyde* (1882), 9 Q. B. D. 76; 51 L. J. Q. B. 452; and see *Clarkson v. Musgrave* (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525. See also *post*, p. 479.

Amount recoverable under Act of 1880.

The plaintiff in an action under the Employers' Liability Act, 1880, cannot recover more than "such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in" a similar employment and the same district (*g*). In *Borlick v. Head* (*h*) it was held that a plaintiff might give evidence, not only of the wages which he had been earning with the defendants, but also of what he had been getting for overtime with another employer. "Section 3 of the Employers' Liability Act, 1880," said Cave, J., "does not give a measure of damages, but the limit of the maximum damages which may be awarded under that Act."

Contracting out of Act.

A contract by a workman not to claim compensation for personal injuries under the Act is valid; and, if the injury results in death, destroys the surviving relatives' right of action under Lord Campbell's Act (*i*).

Probable Amendment Act.

It is proposed by many persons to amend the Employers' Liability Act by preventing persons from contracting out of it, by checking the removal of cases into superior Courts, by abolishing the necessity for notice, by raising the limit of compensation recoverable, by extending the benefits of the Act to seamen, and in other ways.

Volunteers.

A person who *volunteers* to assist servants engaged in their work becomes their fellow-servant so far as an action for personal injuries against the employer is concerned (*k*). But the consignee of goods who, with the employer's assent, assists the employer's servants to unload is not a volunteer (*l*).

Servant lent to third party.

If a person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be considered as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him (*m*).

The Petrel.

It may be here mentioned that it has been recently decided that where two vessels came into collision with each other, belonging to the same owners and the same line, and frequenting the same port

(*g*) Sect. 3.
(*h*) (1886), 34 W. R. 102; 53 L. T. 909.

(*i*) *Griffiths v. Dudley* (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 543.

(*k*) *Degg v. Midland Ry. Co.* (1857), 1 H. & N. 773; 26 L. J. Ex. 171; and see *Abraham v. Reynolds* (1860), 5 H. & N. 143; 8 W. R. 181; *Potter v. Faulkner* (1861), 1 B. & S. 800; 31 L. J. Q. B. 30.

(*l*) *Wright v. L. & N. W. Ry. Co.* (1876), 1 Q. B. D. 252; 45 L. J. Q. B. 570; and see *Holmes v. N. E. Ry. Co.* (1871), L. R. 6 Ex. 123; 40 L. J. Ex. 121.

(*m*) *Donovan v. Laing*, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; following *Rourke v. White Moss Colliery Co.* (1877), 2 C. P. D. 205; 46 L. J. C. P. 283. And see *Union Steamship Co. v. Claridge*, [1894] A. C. 185; 63 L. J. P. C. 56.

and river in which the collision occurred, the master and crew of one vessel are not in a common employment with the master and crew of the other vessel (*n*).

*Liability of Contracting Company for Negligence
of a Second Company.*

THOMAS *v.* RHYMNEY RAILWAY CO. (1871) [119.]

[L. R. 6 Q. B. 266; 40 L. J. Q. B. 89.]

Mr. Thomas was a railway passenger from Caerphilly to Cardiff. Midway between these two stations was Llandaff. From Caerphilly to Llandaff the line belonged to the Rhymney Railway Company, and from Llandaff to Cardiff to the Taff Vale Railway Company, the Llandaff Station being also the exclusive property and under the exclusive control of the latter company. The Rhymney Railway Company, however, had running powers over the line from Llandaff to Cardiff, and issued through tickets for the whole journey from Caerphilly to Cardiff. It was one of these tickets that Mr. Thomas took; and his contract therefore was with the Rhymney Railway Company.

All went well till the episcopal city was reached; but at Llandaff station the station-master, a servant of the Taff Vale Company, was guilty of a gross piece of bungling. He allowed the train in which Mr. Thomas was travelling to leave the station only three minutes after an engine and tender of the Taff Vale Company, carrying no tail light, though the night was very dark, had started on the same line of rails. The consequence was that Mr. Thomas's

(*n*) The Petrel, [1893], P. 230; 62 L. J. P. 92.

train ran into the engine and tender, and Mr. Thomas, with other passengers, was much hurt. The question was whether the Rhymney Company were responsible to the plaintiff for the negligence of the Taff Vale Company, and it was held that they *were*, for it was with them that the contract had been made.

Blake's case.

In deciding *Thomas v. The Rhymney Ry. Co.*, the judges followed a case of *Great Western Ry. Co. v. Blake (o)*, holding that it made no difference as to the defendants' liability whether they ran over the other company's line by virtue of running powers conferred on them by *Act of Parliament* or by *arrangement*.

Mr. John on board the steamer.

The principle is not confined to railway companies. A Mr. John wished to go by the defendant's steamboat from Milford Haven to Liverpool. Passengers embarking with that object used first to go on board a hulk in the harbour belonging not to the defendant, but to a Mr. Williams; and thence they would go on board the steamer. Through the negligence (presumably) of Mr. Williams, a certain hatchway on board this hulk was left unprotected, and Mr. John after taking his ticket fell down it (*p*). For this disaster the steamboat proprietor was held responsible on the Blake and Rhymney principles, namely, that he must be taken to have warranted that no part of the road should be defective through negligence.

Contracting company not responsible for collateral operations.

It is to be observed, however, that the contract of a company with the person to whom they have issued a ticket as to accidents happening through other people's negligence extends only to persons connected with carrying the passenger. They are not responsible for collateral operations. In a case some years ago a gentleman took a ticket from the Midland Railway Company to be carried by them on their line from Leeds to Sheffield. The London and North Western Railway Company had running powers over a portion of the line, and through the driver disobeying the Midland signals, one of their trains dashed into the Midland train and injured the traveller bound for Sheffield. He brought his action, but was not successful, because, as he was informed, the judges "cannot connect with the management of the railway something which is the direct effect, not of defective regulations of the company, not of any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over

(o) (1862), 7 H. & N. 937; 31 L. J. Ex. 316.

(p) *John v. Bacon* (1870), L. R. 5 C. P. 437; 39 L. J. C. P. 365.

whom they have no control whatever, and of whose services they do not make use" (*g*).

A railway company may protect itself by an unsigned condition from liability for the loss of goods beyond its own line, the Railway and Canal Traffic Act only having reference to a company's own line. The chief authority for this is a case where a person, having taken a ticket from the South Eastern Railway Company to go from London to Paris, lost his portmanteau between Calais and Paris on the Great Northern of France Railway (*r*). In a recent case it appeared that a Mr. Burke had taken from the South Eastern Railway Company a return ticket to Paris. On the ticket was a condition (which Mr. Burke never read or knew anything about) that the company would not be responsible for anything happening off their lines. Mr. Burke was injured on some French railway, which his ticket entitled him to travel over, and he went to law with the South Eastern Railway. But it was held that the condition, though they had not taken any sufficient steps to bring it to the plaintiff's notice, absolved them from responsibility (*s*).

Effect of conditions against liability.

As to when the injured traveller can sue the company that has been negligent, instead of the company that has given him a ticket, the recent cases of *Foulkes v. Metropolitan Ry. Co.* (*t*) and *Hooper v. L. & N. W. Ry. Co.* (*u*) may be consulted.

Suing the other company.

Other cases that may be referred to on the subject-matter of this note are *Daniel v. Met. Ry. Co.* (1871), L. R. 5 H. L. 45; 40 L. J. C. P. 121; *Birkett v. Whitehaven Junction Ry. Co.* (1859), 4 H. & N. 730; 28 L. J. Ex. 348; *Buxton v. N. E. Ry. Co.* (1868), L. R. 3 Q. B. 549; 37 L. J. Q. B. 258; *Muschamp v. Lancaster and Preston Ry. Co.* (1841), 8 M. & W. 421; 5 Jur. 656; *Coxon v. G. W. Ry. Co.* (1860), 5 H. & N. 274; 29 L. J. Ex. 165; *Welby v. West Cornwall Ry. Co.* (1858), 2 H. & N. 703; 27 L. J. Ex. 181; *Collins v. Brist. & Ex. Ry. Co.* (1860), 29 L. J. Ex. 41.

Other cases.

(*g*) *Wright v. Midland Ry. Co.* (1873), L. R. 8 Ex. 137; 42 L. J. Ex. 89.

(*r*) *Zunz v. S. E. Ry. Co.* (1869), L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.

(*s*) *Burke v. S. E. Ry. Co.* (1879), 5 C. P. D. 1; 49 L. J. C. P. 107; and see *Watkins v. Ry. Co.* (1883),

10 Q. B. D. 178; 52 L. J. Q. B. 121; *Richardson v. Rowntree*, [1894] A. C. 217; 63 L. J. Q. B. 283. See also *note*, p. 250.

(*t*) (1880), 5 C. P. D. 157; 49 L. J. C. P. 361.

(*u*) (1880), 43 L. T. 570; 50 L. J. Q. B. 103.

*Person Employing Contractor not Generally
Responsible.*

[120.]

QUARMAN *v.* BURNETT. (1840)

[6 M. & W. 499; 4 JUR. 969.]

The defendants were a couple of elderly ladies residing in Moore Place, Lambeth. They kept a carriage of their own, but neither horses nor coachman, and they were in the habit of hiring both from a job-mistress named Mortlock. They generally had the same horses, and always the same coachman, a steady respectable person named Kemp. They paid him 2*s.* a week, but he received regular wages from Miss Mortlock. The man had a regular Burnett livery, which he always put on when he drove the elderly ladies, and which used to hang up in their hall.

A day or two before Christmas Day, 1838, Kemp drove the Miss Burnetts out as usual, and after depositing them at their door went in himself to leave his livery. He knew the horses well, and trusted them to stand still while he was changing his coat. His confidence, however, was misplaced. The horses got frightened at something, and bolted, finally upsetting the plaintiff and severely injuring him.

The question now was whether Kemp was the servant of the Burnetts, so as to make them responsible for what had happened, on the principle *respondeat superior*. Counsel for the plaintiff made great capital out of the livery, the weekly payments, and similar circumstances tending to show that the defendants were the *domine pro tempore*; but in the end it was held that they were not liable (*r*).

(*r*) The same point has been previously (in *Laugher v. Pointer* (1826), 5 B. & C. 547) fully dis-

cussed, but through an equal division left undecided.

REEDIE *v.* LONDON & NORTH WESTERN RAILWAY CO. [121.]
(1849)

[4 EXCH. 244; 20 L. J. EX. 65.]

About forty years ago the London and North Western Railway Company, being engaged in constructing a line between Leeds and Dewsbury, agreed with some contractors named Crawshaw that the latter should make two miles of it in a particular part. By the terms of this agreement the company were to have a general right of superintending the progress of the work, and if the contractors employed incompetent workmen, the power to dismiss them. This being the agreement between the company and the contractors, it happened that Mr. Reedie was one day taking a quiet stroll along the Gomersall and Dewsbury turnpike road, and was just passing under one of the company's viaducts in the part of the line which was being done for them by Messrs. Crawshaw and Co., when by the carelessness of one of the contractor's workmen a big stone fell from above and killed him.

This action was brought by the widow under Lord Campbell's Act; but she was unsuccessful, as the workman whose negligence had caused Mr. Reedie's death was considered not to be a servant of the railway company, notwithstanding their power to dismiss him for incompetence.

To make one person responsible for the negligence of another, it must be shown that the relation of master and servant subsisted between them.

"I apprehend it to be a clear rule," said Willes, J., in 1870, "in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable" (*y*).

Person employing contractor not generally liable for contractor's negligence.

(*y*) *Murray v. Currie* (1870), L. R. 6 C. P. 21; 40 L. J. C. P. 26.

S.—C.

D D

Jones v.
Liverpool
Corporation.

Quarman v. Burnett was followed in the recent case of Jones v. the Liverpool Corporation (z), where a person named Dean had contracted with the corporation, as urban sanitary authority, to supply by the day a driver and horse for their watering-cart. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart it was held that the defendants were not liable.

A contractor exercising an independent employment is not the servant of the person who engages his services, and does not make such person liable for any torts he or his servant may commit (a). Nor, again, is a sub-contractor the servant of the contractor who has employed him. A railway company entered into a contract with A. to make part of their line. A. contracted with B. to build a bridge in that part of the line, and B. in his turn contracted with C. to erect a scaffold, which was necessary for the building of the bridge. Through the negligence of C.'s workmen somebody tumbled against the scaffold and by-and-by brought an action against B., the builder of the bridge, for personal injuries. But it was held that he ought to have sued C., if anybody (b).

Excep-
tions.

There are, however, some exceptional cases in which a person employing a contractor is liable for the contractor's wrongful acts :—

Inter-
ference.

1. *Where the employer personally interferes.*

The proprietor of some newly-built houses had his attention drawn by a policeman to the fact that a contractor he had employed to make a drain had left a heap of gravel by the roadside. The proprietor said he would get it removed as soon as possible, and paid a navvy to cart it away. The navvy did not do his work thoroughly, and a person driving home was upset and injured. In an action by this person against the proprietor, Quarman v. Burnett was cited for the defence, and it was urged that it was the contractor who was liable. But the proprietor was held liable, on the ground that it did not appear that the contractor had undertaken to remove the gravel, and the proprietor had busied himself about it (c).

Illegality.

2. *Where the thing contracted to be done is unlawful.*

A company, without the special powers for that purpose which they ought to have had, employed a contractor to open trenches in the streets of Sheffield. The plaintiff walking down the street, fell

(z) (1885), 14 Q. B. D. 890; 54 L. J. Q. B. 345. This case was discussed in Donovan v. Laing, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25.

(a) Milligan v. Wedge (1840), 12 Ad. & E. 737; 1 Q. B. 714.

(b) Knight v. Fox (1850), 5 Ex. 721; 20 L. J. Ex. 9.

(c) Burgess v. Gray (1845), 1 C. B. 578; 14 L. J. C. P. 184.

over a heap of stones left there by the contractor, and broke her arm. She succeeded in getting damages out of the company, the distinction being clearly drawn between a contractor being employed to do something lawful and to do something unlawful (*d*).

3. *Where the thing contracted to be done is perfectly lawful in itself, but injurious consequences must in the natural course of things arise, unless effectual means to prevent them are adopted.*

Injurious
conse-
quences
not
guarded
against.
Bower v.
Peate.

The defendant wishing to rebuild his house, employed a contractor to pull it down and erect a new one. The contractor undertook the risk of supporting the plaintiff's house during the work, and to make good any damage and satisfy any claims arising thereon, but the defendant was held liable for injury to the plaintiff's house, caused by the insufficiency of the means taken by the contractor to support it (*e*).

The same thing was held in *Hughes v. Percival* (*f*), which was also a case of dangerous building operations. And this principle was again approved and applied in the recent case of *Black v. Christchurch Finance Co.* (*g*).

Hughes v.
Percival.
Black v.
Christ-
church
Finance
Co.

4. *Where an employer is bound by statute to do a thing efficiently.*

A railway company were authorized by Act of Parliament to make an opening bridge over a navigable river. They employed a contractor, and that gentleman ingeniously made them a bridge which would not open. The plaintiff's vessel was in consequence prevented from navigating the river, and the company were held responsible to him (*h*).

Statutory
obligation
to do thing
properly.

The following cases may also be referred to on the subject-matter of this note:—*Gray v. Pullen* (1864), 5 B. & S. 970; 34 L. J. Q. B. 265; *Glover v. East Lond. Waterworks Co.* (1868), 17 L. T. 475; 16 W. R. 310; *Blake v. Thirst* (1863), 2 H. & C. 20; 32 L. J. Ex. 188; *Bush v. Steinman* (1799), 1 B. & P. 404; *Angus v. Dalton* (1881), 6 App. Ca. 740; 50 L. J. Q. B. 689.

Other
cases.

(*d*) *Ellis v. Sheffield Gas Consumers' Co.* (1853), 23 L. J. Q. B. 42; 2 El. & Bl. 767.

L. J. Q. B. 719.

(*e*) *Bower v. Peate* (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446.

(*g*) [1894] A. C. 48; 63 L. J. P. C. 32.

(*f*) (1883), 8 App. Ca. 443; 52

(*h*) *Hole v. Sittingbourne Ry. Co.* (1861), 6 H. & N. 488; 30 L. J. Ex. 81.

Responsibility of Master for Torts of Servant.

[122.] LIMPUS *v.* LONDON GENERAL OMNIBUS CO.
(1862)

[32 L. J. Ex. 34; 1 H. & C. 526.]

“During the journey,” say the regulations of the London General Omnibus Company, “he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list. *He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business, whether such omnibus be one belonging to the company or otherwise.*” In defiance of this excellent rule one of the company’s drivers, between Sloane Street and South Kensington, obstructed and upset a rival ’bus belonging to the plaintiff. In an action for the damage so done it was urged for the defendants that the driver was acting contrary to his orders, and therefore outside the scope of his employment. This contention, however, was not successful, for it was held that though the driver had acted recklessly and improperly and in flat disobedience to his express orders, he had acted, as he thought, for the good of his employers, and sufficiently in the course of his employment to make them liable.

[123.] POULTON *v.* LONDON & SOUTH WESTERN
RAILWAY CO. (1867)

[L. R. 2 Q. B. 534; 36 L. J. Q. B. 294.]

Mr. Poulton, a horse dealer, took a horse to the Salisbury Agricultural Show, and, after winning any number of prizes, returned with it to Romsey. When he

arrived at his destination he gave up a ticket for himself, and a certificate for his horse. This, however, did not satisfy the station-master, who called upon him to pay 6s. 10d. for the carriage of the horse, under a mistaken notion that it could not be carried free by that train. Poulton refused to pay this sum, and was consequently arrested by a couple of policemen acting under the station-master's orders, and detained in custody till it was found by telegraphing that Poulton was right and the station-master wrong.

The injured horse dealer now brought an action against the railway company for false imprisonment, but was defeated on a point of law. They successfully answered his claim by saying that, as they themselves would have had no right to apprehend the plaintiff for not paying his horse's fare, so their servant the station-master could have had no implied authority from them to do what he did.

In order that a master may be responsible for a tort committed by his servant, the latter must in general have been acting *in the course of his regular employment*. If while driving me, or driving on my business, my servant negligently injures a person, I am clearly liable. So am I even if the accident occurs while the servant is *temporarily deviating* for a purpose of his own. A contractor gave strict orders to his workmen that they were not to leave their horses, or to go home during the dinner hour. One of them, however, disobeyed these orders, and went home to his dinner a quarter of a mile off, leaving his cart and horse standing unattended outside. They ran away, and injured the plaintiff's railings. The man's master was held responsible, on the ground that the workman *was acting within the general scope of his authority to conduct the horse and cart during the day* (i).

General rule.

Temporary deviation.

But if the *enterprise is entirely the servant's*—if, for instance, he takes his master's carriage without leave for purposes entirely his own—the master is not responsible. One May Saturday in 1869 a city wine-merchant sent a clerk and carman with a horse and cart to deliver wine at Blackheath, and to bring back a quantity of empty bottles to the offices, which were in the Minories. On the

Total deviation.

(i) *Whatman v. Pearson* (1868), L. R. 3 C. P. 422.

homeward journey, after crossing London Bridge, *they should have turned to the right; instead of that they turned to the left, and went in the opposite direction on some private matter of the clerk's.* While thus going quite against their orders, they ran over a child. It was held that the city wine-merchant was not responsible (*k*).

It is obvious, however, that the distinction between these two cases is somewhat fine.

The clerk who left the water running.

A case on this subject is *Stevens v. Woodward* (*l*). The plaintiffs were the well-known law publishers carrying on business at 119, Chancery Lane, and the defendants were some solicitors occupying premises over their shop. In the private room of one of the defendants was a lavatory, which the clerks had clear instructions never to use. One afternoon, however, after this gentleman had left, a disobedient clerk, thinking no one would ever know, went into the room to wash his hands. "*I turned the tap,*" the young man afterwards said in evidence, "*and the water did not flow; and then I went out.*" But after the youth had gone out, the water did flow, and flowed so abundantly that a large number of treatises of Messrs. Stevens and Sons down below were spoilt. In an action against the solicitors for the mischief thus inflicted, it was held that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and therefore his masters were not liable. "*The clerk,*" said Lindley, J., "*was a trespasser after his master had left.*"

Duty to take care.

A master, however, is not liable for the negligence of his servant, though committed in the course of his regular employment, unless there is a breach of a duty to take care. An illustration of this is to be found in the recent case of *Neuwith v. Over-Darwen Society* (*m*). There a committee hired the defendants' concert-hall for an evening concert. The memorandum of letting contained no mention of a rehearsal, but a rehearsal was held on the same afternoon without objection. When it had ended, the plaintiff, without request or notice to the hall-keeper, placed his double-bass violin safely in a small room attached to the concert-hall, but in the way of a gas-bracket. The hall-keeper was the defendants' servant, and his

The violin case.

(*l*) *Storey v. Ashton* (1869), L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; and see *Wilson v. Owens* (1885), 16 L. R. Ir. 225. The principle of the *Coupé Co. v. Ma'dick*, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; has no analogy, of course, to the subject now under discussion; the point decided in that case being that the bailee for hire of a chattel is responsible to the bailor for

damage done to the chattel through negligence of the bailee's servant, though not done in the course of his employment.

(*l*) (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231. But see this case distinguished in *Ruddiman v. Smith* (1889), 60 L. T. 708; 37 W. R. 528.

(*m*) (1894), 63 L. J. Q. B. 290; 70 L. T. 374.

duties were to prepare and clean the rooms, open and shut the doors, and attend to the gas. In order to light the gas in the small room the hall-keeper moved the violin in such a way that it fell and was broken. It was held that there had been no such negligence on the part of the hall-keeper in the discharge of his duty towards the defendants as to render them liable to the plaintiff for the damage to his violin. "I am clearly of opinion," said Collins, J., "that there was no duty cast on the defendants. The case is extremely analogous to that of *Lethbridge v. Phillips* (*u*), where A. lent a picture to B., who wished to show it to C., and B., unknown to C., sent it to C.'s house, where it was accidentally injured. It was there held that C. was not responsible for not keeping the picture safely. He was under no contract, and therefore not liable."

The point, of course, is often taken for the defence in cases of this kind that the person causing the mischief was not the defendant's servant so as to make him liable. An important class of

Was he
servant?

such cases are those in which it is sought to make the proprietor of a cab liable for the negligence of the driver. Strictly, where the

Cabby.

driver has hired the cab from its owner for a fixed sum, the relation between the parties is that of bailor and bailee; but it has been held that the effect of the Acts of Parliament regulating cabs is, in the interests of the public, to render the proprietor responsible for the torts of the driver. Thus, in the case of a cab proprietor who let out a cab and horses by the day, the amount paid for hire being independent of the cabman's earnings, where through the negligence of the latter his fare found himself minus his luggage, the proprietor was held responsible (*o*). And in the later case of *Venables v. Smith* (*p*), the arrangement between the parties being the same as in *Powles v. Hider*, it was held that the proprietor of the cab was responsible to the plaintiff for a drunken driver's running him down. But in a more recent case than either of the above it has been held that where the driver hired a cab, *and himself provided the horse and harness*, the owner of the cab was not answerable for the consequences of the driver's negligence (*q*). The legislation regulating locomotives on highways is, in this respect, not analogous to that dealing with hackney carriages (*r*). In *Steel v. Lester* (*s*) the action was brought by the owner of a wharf at

Traction
engines.

Master of
ship having
share of
profits.

(*u*) (1819), Stark. 511.

(*o*) *Powles v. Hider* (1856), 6 El. & Bl. 267; 25 L. J. Q. B. 331; and see *Fowler v. Lock* (1872), L. R. 7 C. P. 272; 9 C. P. 751.

(*p*) (1877), 2 Q. B. D. 279; 46 L. J. Q. B. 479; approved in the recent case of *King v. London Improved Cab Co.* (1889), 23

Q. B. D. 281; 58 L. J. Q. B. 456.

(*q*) *King v. Spurr* (1881), 8 Q. B. D. 104; 51 L. J. Q. B. 105.

(*r*) See *Smith v. Bailey*, [1891] 2 Q. B. 403; 60 L. J. Q. B. 779.

(*s*) (1877), 3 C. P. D. 121; 47 L. J. C. P. 43. And see *The Apollo, Little v. Port Talbot Co.*, [1891] A. C. 199; 61 L. J. P. 25; where

Noisy
church-
men.

Spalding for injury done to his wharf by a sloop, which through the negligence of her master, a man named Lilee, had broken loose from her moorings. The sloop really belonged to Lester, and he was registered as the owner; but Lilee did not merely act as his hired servant: there was an agreement between them by which Lilee not only had complete control over the vessel, but was entitled to two-thirds of the net profits. In spite of this agreement it was held that Mr. Lester must pay for the mending of Mr. Steel's wharf. In *Lucas v. Mason* (*t*), decided rather earlier than the two cases just referred to, the action was by a man who had been turned out of a Church Liberation Association meeting in Lancashire against the chairman, who had said, "*I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front.*" It was held that there was not the ordinary relation of master and servant here, and that the chairman was not responsible.

Lending
servants.

A man is not answerable for the tortious acts of his *servant whom he has lent to another*, committed while in the service of that other. This was held in a case in which some colliery proprietors had agreed with a Mr. Roger Whittle that he should do some sinking and excavating for them, and that they should place certain of their servants under his entire control. One of these servants, an engineer named Lawrence, fell asleep when he ought to have been particularly wide awake. It was held that the plaintiff, who had suffered injury in consequence, could not maintain an action against the colliery proprietors, because, though the engineer remained their general servant, yet he was acting as Whittle's servant at the time of the accident (*u*).

Wilful and
malicious
acts of
servants.

A master is never responsible for the *wilful and malicious* act of his servant, even while acting in his employment. If, for example, a driver were to lose his temper, and, out of angry feeling, were to drive his master's carriage against another carriage, and so bring about an accident, the master would not be responsible. As Lord Kenyon said, in a well-known case on the subject: "When a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his

a dock company were held liable for damages to a ship resulting from the representations and negligence of the harbour-master. But see *Wright v. Lethbridge* (1891), 63 L. T. 572; 6 Asp. M. C. 558.

(*t*) (1875), L. R. 10 Ex. 251; 44 L. J. Ex. 145.

(*u*) *Rourke v. White Moss Colliery Co.* (1877), 2 C. P. D. 205;

46 L. J. C. P. 283; and see *Jones v. Corporation of Liverpool* (1885), 14 Q. B. D. 890; 54 L. J. Q. B. 345; *Johnson v. Lindsay*, [1891] A. C. 371; 61 L. J. Q. B. 90; *Cameron v. Nystrom*, [1893] A. C. 308; 62 L. J. P. C. 85; *Donovan v. Laing*, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25.

own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be liable for such act" (x).

It is scarcely necessary to say that a man is not liable *criminally* for the acts of his servants (y). But a master *is* civilly responsible for the tortious act of his servant committed in the course of his employment and for the master's benefit, notwithstanding that the act of the servant is a criminal act. And the master is not released from liability by reason that the servant, having been convicted of the offence, is, by virtue of sect. 45 of 24 & 25 Vict. c. 100, released from all further or other proceedings, civil or criminal, for the same cause (z).

A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done. Thus, in an action for assault, a railway company was held liable for the violence of a porter who roughly pulled a passenger out of a carriage because he thought that it was the wrong compartment (a). And where the superintendent at a railway station without reasonable cause gave a passenger into custody for travelling without a ticket, and an Act of Parliament authorized this to be done in the case of passengers travelling without having paid their fare, the company was held liable (b). But it is not within the ordinary scope of a bank manager's authority to order the arrest or prosecution of offenders (c), nor has the booking-clerk of a railway company authority to give into custody a person whom he suspects of attempting to rob the till, after the attempt has ceased (d). Similarly a railway porter left in charge of a station does not

(x) *Macmanus v. Crickett* (1800), 1 East, 106.

(y) *Reg. v. Holbrook* (1878), 4 Q. B. D. 42; 48 L. J. Q. B. 113; *Chisholm v. Doulton* 1889, 22 Q. B. D. 736; 58 L. J. Q. B. 133; *Roberts v. Woodward* (1890), 25 Q. B. D. 412; 59 L. J. M. C. 129. But see *Niven v. Greaves* (1890), 54 J. P. 548, a case decided under sect. 96 of the Public Health Act, 1875; and *St. Helens Tramways Co. v. Wood* (1892), 60 L. J. M. C. 141; 56 J. P. 70.

(z) *Dyer v. Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 418.

(a) *Bayley v. Manchester, Sheffield and Lincolnshire Ry. Co.* (1873), L. R. 7 C. P. 415; 8 C. P. 148; 42 L. J. C. P. 78; see also *Seymour v. Greenwood* (1861), 7

H. & N. 355; 30 L. J. Ex. 327; and *Dyer v. Munday*, *supra*.

(b) *Goff v. Great Northern Ry. Co.* (1861), 3 E. & E. 672; 30 L. J. Q. B. 148; see also *Moore v. Metropolitan Ry. Co.* (1872), L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; *Edwards v. Midland Ry. Co.* (1880), 6 Q. B. D. 287; 50 L. J. Q. B. 281; *Lowe v. Great Northern Ry. Co.* (1893), 62 L. J. Q. B. 524; 5 R. 535.

(c) *Bank of New South Wales v. Owston* (1879), 4 App. Ca. 270; 48 L. J. P. C. 25.

(d) *Allen v. London and South Western Ry. Co.* (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; and see the recent case of *Abrahams v. Deakin*, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238.

Crime of servant.

render the company liable in an action for false imprisonment when he gives an innocent person into custody on the charge of stealing the company's property (*e*). "There seems no ground for saying," remarked Keating, J., "that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted." In the recent case of *Richards v. The West Middlesex Waterworks Co.* (*f*), it was held that a bailiff who committed an unnecessary assault in levying a distress was not acting within the scope of his authority, and did not make his employers responsible. See also *Furlong v. South London Tramways Co.* (1884), 1 C. & E. 316; 48 J. P. 329.

Ruinous Premises.

[124.]

TODD *v.* FLIGHT. (1860)

[9 C. B. N. S. 377; 30 L. J. C. P. 21.]

Flight bought a shaky old house next door to the plaintiff's chapel, and let it to a tenant. By-and-by the house tumbled down on the chapel, and did it the mischief in respect of which this action was brought. Mr. Flight's answer to the claim was—"The occupier, my tenant, is responsible; not I, the innocent reversioner." But it was held that, as Flight had let the house when he knew the chimneys to be in a very dangerous condition, and as the building had fallen by the laws of nature, and not through the default of the tenant, it was he who must pay.

Occupier
generally
liable.

The general rule is that *the occupier*, not the landlord, is responsible for any injury happening to a third person through premises being out of repair. Thus, in *Tarry v. Ashton* (*g*), it was held that an occupier in the Strand who had a lamp projecting several feet

(*e*) *Edwards v. London and North Western Ry. Co.* (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241.

(*f*) (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551.

(*g*) (1876), 1 Q. B. D. 314; 45 L. J. Q. B. 260.

across the pavement was bound to keep it in repair so as not to be dangerous to persons passing along the street, and was liable for damage done to an old woman on whom it fell through want of repair, notwithstanding that he had employed a competent contractor to put it right. "There are only two ways," said the Court in a recent case (*h*), where an insufficiently fastened chimney-pot got dislodged by a high wind and injured somebody, "in which landlords or owners can be made liable in the case of an injury to a stranger by the defective repair of premises let to a tenant, *the occupier, and the occupier alone, being prima facie liable*: first, in the case of a contract by the landlord to do the repairs, where the tenant can sue him for not repairing; secondly, in the case of a *misfeasance* by the landlord, as, for instance, where he lets premises in a ruinous condition."

The rotten lamp in the Strand.

Landlord liable in only two cases.

Reference may be made to the recent case of *Miller v. Hancock* (*i*). The defendant was the owner of a building in the City, the different floors of which were let by him separately as chambers or offices, the staircase, by which access to them was obtained, remaining in the possession and control of the defendant. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and sustained personal injuries. Upon these facts the Court of Appeal held, that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase in repair, and, inasmuch as the defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part towards such persons to keep it in a reasonably safe condition.

Miller v. Hancock.

But a landlord is liable who lets land with a continuous nuisance upon it which he takes no steps to remove: *e.g.*, with an obstructive wall (*k*), or a stinking privy (*l*). He is not liable, however, for a nuisance occasioned by the particular use to which the occupiers choose to put the premises (*m*), unless, indeed, the nuisance arises naturally and of necessity from the use of the premises as contemplated by the demise (*n*). Even where a nuisance arising from a defect in the premises does not exist at the commencement of a tenancy, a landlord may become liable for its continuance by

Letting land with nuisance. Nuisance created by occupier.

(*h*) *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311; 46 L. J. C. P. 675.

(*i*) [1893] 2 Q. B. 177; 69 L. T. 214. And see *Smith v. London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326; 37 L. J. C. P. 217.

(*k*) *Rosewell v. Prior* (1701), 2 Salk. 439; 12 Mod. 635.

(*l*) *R. v. Peddy* (1834), 1 A. & E. 822; 3 N. & M. 627.

(*m*) *Rich v. Basterfield* (1817), 4 C. B. 783; 16 L. J. C. P. 273.

(*n*) *Harris v. James* (1876), 35 L. T. 210; 45 L. J. Q. B. 515.

allowing the tenant to continue in possession beyond the original term. In the recent case of *Bowen v. Anderson* (*o*), the plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy. The evidence showed that the defect had existed for some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to the defective state of the flagstone, or to the presence of clay, which prevented the plate from fitting. The county court judge directed a verdict for the plaintiff, the amount of damages being agreed. But on appeal a new trial was ordered, it being held that a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy, that the continuance of the tenant's occupation on the expiration of each week did not render the defendant liable for defects then existing, as if there had been a re-letting, and that it was a question for the jury whether the injury was caused by the negligence of the tenant, or by a structural defect existing at the date of the original letting, for which the defendant would be liable.

Bowen v. Anderson.

In delivering judgment, Wills, J., said: "I think the decision in *Sandford v. Clarke* (*p*) was right, but I think the grounds on which the judgment was based were not right. It is my own decision, and therefore I feel the more free to criticise it. I think we were mistaken in holding that a weekly tenancy comes to an end at the end of each week. The attention of the Court was not called to the case of *Jones v. Mills* (*q*), and that decision was overlooked in giving judgment." In *Gandy v. Jubber* (*r*), the tenancy was from year to year, and the Court of Queen's Bench held that the landlord might have re-entered at the end of each year, and that he was therefore liable for the consequences resulting from an accident caused by a grating in front of the house having been for some years in a defective state. In the Exchequer Chamber the decision was overruled, on the ground that it proceeded upon a misapprehension of the peculiar relations existing between the landlord and tenant in the case of a tenancy from year to year. Such a tenancy requires something to be done between the landlord and tenant in order to determine the tenancy.

Sandford v. Clarke.

Gandy v. Jubber.

(*o*) [1894] 1 Q. B. 164; 42 W. R. 236.

(*p*) (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507. See Woodfall's *Landlord and Tenant*, 15th ed., p. 776; and Roscoe's *Nisi Prius*, 16th ed. p. 1009.

(*q*) (1861), 10 C. B. N. S. 788; 31 L. J. C. P. 56.

(*r*) (1864), 5 B. & S. 78, 485; 33 L. J. Q. B. 151; and undelivered judgment *contra* in Ex. Ch. 9 B. & S. 15.

In the absence of special circumstances, it is the duty of the tenant, and not of the landlord, to see that fences are in repair, so that cattle cannot stray on the land of others (s). Liability of tenant for defective fences.

Where the servant of the defendant causes the nuisance in the course of his employment, the defendant may be liable, though neither occupier nor landlord; *e.g.*, where the earman of a coal merchant delivering coals at a customer's removed an iron plate in the footway without taking proper precautions against accidents (t). Whiteley v. Pepper.

The following cases may also be consulted:—*Pretty v. Bickmore* (1873), L. R. 8 C. P. 401; 28 L. T. 704; *GwinneU v. Eamer* (1875), L. R. 10 C. P. 658; 32 L. T. 835; *Payne v. Rogers* (1794), 2 H. Bl. 349; *Russell v. Shenton* (1842), 3 Q. B. 449; 2 G. & D. 573; *White v. Jameson* (1874), L. R. 18 Eq. 303; 22 W. R. 761; *Bishop v. Bedford Charity* (1859), 1 E. & E. 697; 29 L. J. Q. B. 53. Other cases.

Damage from Sparks of Railway Engines.

VAUGHAN *v.* TAFF VALE RAILWAY CO. (1860) [125.]
[5 H. & N. 679; 29 L. J. Ex. 247.]

Mr. Vaughan was the proprietor of a plantation adjoining the embankment of the Taff Vale Railway Company. The grass growing in the plantation was of a very combustible nature, and so were some dry branches. In fact, the whole was graphically described by the plaintiff himself as being “in just about as safe a state as an open barrel of gunpowder would be in the Cyfarttfa Rolling-mill.” One day this susceptible plantation was discovered to be on fire, and eight acres of it were burnt. It was not disputed that it had taken fire from a spark from one of the defendants’ engines, but they contended, and it was decided,

(s) *Choctham v. Hampson* (1791), 4 T. R. 318.

(t) *Whiteley v. Pepper* (1877), 2 Q. B. D. 276; 46 L. J. Q. B. 436.

that they were not responsible, as they *were authorized to use such engines, and had adopted every precaution that science could suggest to prevent injury.*

Train
frighten-
ing horses.

In the earlier case of *R. v. Pease* (*u*), it had been decided that a railway company authorized by statute to use locomotive engines are not indictable for a nuisance if their engines frighten the horses of persons travelling along a highway running parallel to the line. "The legislature," said the Court, "must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandise along the new railroad."

The vibra-
tion case.

The leading case and the one just referred to were both approved in the great case of the Hammersmith Railway Company *v. Brand* (*x*), where it was held that the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act, do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby.

Truman's
case.

The case of *The London, Brighton and South Coast Railway Company v. Truman* (*y*), is to the same effect. The occupiers of houses near the East Croydon Station were very much annoyed by the noise made by cattle and drovers brought on to the land of the railway company, but it was held that the company were protected by their Act against legal proceedings for a nuisance. The Vaughan, Pease, and Brand cases were followed, and the Hill case was distinguished. "I think it is enough," said Lord Halsbury,

(*u*) (1832), 4 B. & Ad. 30; 1 N. & M. 690; and see *Lea Conservancy Board v. Mayor of Hertford and others* (1884), 1 C. & E. 299; 48 J. P. 628.

(*x*) (1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265. See also the recent case of *Harrison v. South-wark and Vauxhall Water Co.*, [1891] 2 Ch. 409; 60 L. J. Ch.

630.

(*y*) (1885), 11 App. Ca. 45; 55 L. J. Ch. 354; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; 62 L. J. Ch. 699. But see *R. v. Essex* (1889), 14 App. Ca. 153; 58 L. J. Q. B. 594; *Gas Light Co. v. St. Mary Abbots* (1885), 15 Q. B. D. 1; 54 L. J. Q. B. 414.

L. C., referring to the last-mentioned case, "in discussing that case to say that the ground of the decision was one which distinguished it from the present by reason of the very nature of the enactment which was then under discussion. The Railway Acts, treated as a well-known and recognized class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then construing. Broadly stated, the distinction taken amounted to this, that a small-pox hospital might be built and maintained if it could be done without creating a nuisance; whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not."

On the other hand, if a company have been guilty of negligence—indeed, if they have not adopted the latest appliances to prevent danger—their statutory authority will not help them (z). An important case on this point is *Smith v. The L. & S. W. Ry. Co.* (a). In the middle of a hot summer, some workmen of the company, who had been cutting the grass and trimming the hedges by the side of the line, left the trimmings lying about in heaps, instead of carting them all away. After the heaps had been there a fortnight, they were one day—presumably from the sparks of an engine of the company that had just gone by—discovered to be on fire. The fire was fanned by a high wind, and finally burnt down the cottage of Smith, two hundred yards off. It was held that the defendants, though their engines were of the best possible construction, were responsible for the damage thus done. So it has been held to be actionable negligence to blow off steam at a level crossing (b).

Moreover, if persons are not authorized by statute to run locomotive engines, and yet do so, they are liable for injuries resulting, though negligence is expressly negatived (c). This is on the principle of *Fletcher v. Rylands* (d), viz., that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril.

Further, where by statute a thing is *permitted*, *not directed*, to be done, it is not in general to be inferred that the right of action is taken away for a nuisance caused by the doing of such thing, even

Negligence.

No statutory authority.

Statutory authority, but common law rights reserved.

(z) *Fremantle v. L. & N. W. Ry. Co.* (1861), 10 C. B. N. S. 89; 31 L. J. C. P. 12; and see *Geddis v. Baun Reservoir* (1878), 3 App. Ca. 430; *Brine v. G. W. Ry. Co.* (1862), 31 L. J. Q. B. 101; 2 B. & S. 402.

(a) (1876), L. R. 6 C. P. 11.

(b) *Manchester South Junction Ry. Co. v. Fullarton* (1863), 14 C. B. N. S. 54; 11 W. R. 754.

(c) *Jones v. Festiniog Ry. Co.* (1868), L. R. 3 Q. B. 733; 37 L. J. Q. B. 212.

(d) See *ante*, p. 356.

Small-pox
hospitals.

Traction
engines.

Rapier *v.*
London
Tramways
Co.

Other
cases.

if such nuisance is not due to any negligence in the manner of the doing it. In virtue of this principle, some property owners at Hampstead a few years ago managed to get rid of a small-pox hospital from their neighbourhood (*e*); and a farmer down in Wiltshire got damages out of the owner of a traction engine, the sparks from which had in some unaccountable way set on fire one of his stacks. "It is hardly contended," said Baggallay, L. J., "that the defendant is not liable at common law; but section 5 of the Locomotive Act, 1865, is relied upon as affording a defence. But I think it quite clear that the right at common law is preserved by section 12" (*f*).

Another good illustration of this principle is the recent case of *Rapier v. London Tramways Co.* (*g*). The defendants were a tramway company, who were empowered by their Act to lay down certain tramway lines "with all proper works and conveniences connected therewith." The Act gave no compulsory powers for taking lands, and made no special mention of building stables. The defendants constructed the lines, and bought some land near the plaintiff's premises, and erected thereon a large block of stables for the horses employed in drawing the cars, resulting in offensive smells being occasioned and constituting a nuisance to the plaintiff. The Court of Appeal (affirming Kekewich, J.) held, that although horses were necessary for the working of the tramways, the defendants were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbours, and that, therefore, the fact that they had taken all reasonable care to prevent a nuisance was no legal excuse.

The following cases may also be referred to as to injuries resulting from the exercise of statutory powers:—*Cator v. Lewisham Board of Works* (1861), 5 B. & S. 115; 34 L. J. Q. B. 74; *Lawrence v. G. N. Ry. Co.* (1851), 16 Q. B. 643; 20 L. J. Q. B. 293; *Fleming v. Manchester Corporation* (1881), 44 L. T. 517; 45 J. P. 423; *Brownlow v. Metr. Board* (1864), 33 L. J. C. P. 233; 16 C. B. N. S. 546; *Manley v. St. Helens, &c. Co.* (1858), 2 H. & N. 840; 27

(*e*) *Metr. Asylum District v. Hill* (1881), 6 App. Ca. 193; 50 L. J. Q. B. 353; and see *Attorney-General v. Manchester Corporation*, [1893] 2 Ch. 87; 62 L. J. Ch. 459; *Vernon v. Vestry of St. James* (1880), 16 Ch. D. 449; 50 L. J. Ch. 81; *Bendelow v. Wortley Union* (1887), 57 L. J. Ch. 762; 57 L. T. 849.

(*f*) *Powell v. Fall* (1880), 5 Q. B. D. 597; 49 L. J. Q. B. 428.

(*g*) [1893] 2 Ch. 588; 63 L. J. Ch. 36. And see *Meux's Brewery Co. v. City of London Electric Lighting Co.*, and *Shelfer v. The same*, [1895] 1 Ch. 287; 64 L. J. Ch. 216; where it was held that the *Electric Lighting Act, 1882* (45 & 46 Vict. c. 56), does not relieve a company formed thereunder from liability for a nuisance committed in the execution of the powers of the Act.

L. J. Ex. 159; *Milnes v. Huddersfield* (1883), 12 Q. B. D. 443; 53 L. J. Q. B. 12.

The law was formerly much stricter about the safe keeping of fire than it is now. A man was responsible for an *accidental* fire which broke out on his premises and burnt his neighbour's house. And in days when houses were mostly made of wood it was quite right to be strict. But by 14 Geo. III. c. 78 (the Building Act), it was provided that "no action should lie against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire should . . . *accidentally* begin" (*h*). A case of some celebrity on the subject is *Vaughan v. Menlove* (*i*). A farmer in Shropshire had a hayrick in a highly dangerous condition. It smoked, and steamed, and showed unmistakeable signs of being about to take fire. To the advice and remonstrances of his neighbours who pointed out its condition, all the answer the farmer vouchsafed was, "Oh, nonsense! I'll chance it." Finally, indeed, he did take a kind of precaution: he made a chimney through the rick; which, though done with good intentions, was scarcely wise. The rick took fire, and burnt the plaintiff's cottages in the next field. For this damage the farmer was held responsible. "The care taken by a prudent man," said Tindal, C. J., "has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question."

A master is responsible (in spite of 12 Geo. III. c. 73, s. 35, which imposes penalties on them) for fires negligently caused by his servants whilst carrying into effect their master's orders (*k*). But in *Williams v. Jones* (*l*) a master was held *not* liable for a fire caused by the negligent use of a *pipe* by his servant, because fire had no kind of connection with the work the man was engaged on; and a similar view was taken in another case (*m*), where a maid-servant, whose business was simply to light a fire, took it into her head to clear the chimney of soot by setting it on fire, and burnt the whole place down.

(*h*) Sect. 86.

(*i*) (1837), 3 Bing. N. C. 468; 4 Scott, 244.

(*k*) *Tubervil v. Stamp* (1698), 1 Salk. 13; 1 Ld. Raym. 264.

(*l*) (1865), 3 H. & C. 602; 33

L. J. Ex. 297. Justices Blackburn and Mellor, however, dissented from the view of the majority of the Exchequer Chamber.

(*m*) *McKenzie v. McLeod* (1834), 10 Bing. 385; 4 M. & Scott, 249.

Support from Neighbouring Land.

[126.]

SMITH *v.* THACKERAH. (1866)

[L. R. 1 C. P. 564 ; 35 L. J. C. P. 276.]

Mr. Smith having built a wall close to the edge of his land, his neighbour, Mr. Thackerah, proceeded to dig a well on his own land, but within a few feet of the wall. The consequence was, down went Smith's wall. Smith now went to law for the injury done to his wall, but, *as it appeared that, if there had been no building on Smith's land, he would have suffered no appreciable damage by Thackerah's proceedings*, it was held that he had no right of action.

*Sic utere
tuo.*

Un-
weighted
by build-
ings.

Every man must so use his own property as not to injure his neighbour's. In virtue of this principle an owner of land is entitled to require that his neighbour, whether he be the owner of the subjacent soil or of the adjacent land, shall not so treat it as to deprive him of due support. This right, however, exists only in favour of land unweighted by buildings, that is to say, of land in its natural state. The most obvious common sense dictates that a person has no business to load his own soil with buildings in such a way as to make it require the support of his neighbour's land. Such rights to support, however, may be acquired by grant or prescription. This grant may be implied. For example, when one man sells part of his land for building purposes, he impliedly grants sufficient lateral support from his adjacent land for such buildings. He would not be allowed, for instance, to work mines dangerously near to them (*n*). And, even if there is no such easement by grant or prescription, yet, if the damage done to the dominant land is so considerable as to be actionable, damages may be recovered for injury sustained by recently erected buildings. "The moment the jury found," said Pollock, C. B., in *Brown v. Robins* (*o*), "that the subsidence of the land was not caused by the weight of the super-

*Brown v.
Robins.*

(*n*) *Elliot v. N. E. Ry. Co.* (1863), 10 H. L. C. 333 ; 32 L. J. Ch. 402 ; and see *Siddons v. Short* (1877), 2 C. P. D. 572 ; 46 L. J. C. P. 795.

(*o*) (1859), 4 H. & N. 186 ; 28 L. J. Ex. 250. And see *Attorney-General v. Conduit Colliery Co.*, [1895] 1 Q. B. 301 ; 64 L. J. Q. B. 207.

incumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is *as if a mere model stood there*, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it." Thus, if in *Smith v. Thackerah* it had appeared that Smith's land in its natural state would have suffered appreciable damage by Thackerah's well, Smith would have been entitled to claim compensation for the injury occasioned to his wall.

The case of *Angus v. Dalton* (*p*) is very important on this branch of the law. The action was brought for damages in respect of injuries to the plaintiff's coach factory by pulling down the adjoining house. After a dreadful amount of litigation, the plaintiff was successful; it being held that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time, and that it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building.

Angus v. Dalton.

But, as between adjoining houses, the general rule is that there is *no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it standing and in repair*: all he is bound to do is to prevent its becoming a nuisance and falling on to his neighbour's house (*q*). But a right to support of the kind may be gained by grant, express or implied. Where, for instance, two houses are built by the same man, and depend on one another's support, there remains a mutual right to support after they have passed into the hands of different owners (*r*).

Adjoining houses.

It is to be observed that the right to support which a man may have in favour of his land or buildings is quite independent of the question of negligence. A man, of course, is always responsible to his neighbour for carrying out works on his own land in a negligent and improper way.

Negligence.

In the important case of *Bonomi v. Backhouse* (*s*), the question arose as to the time at which an actionable injury arises, and in the end it was held that it dates, not from the time of the commencement of the wrong-doing—the digging, for instance—but from the time of the plaintiff's first sustaining actual injury; the effect of

Bonomi v. Backhouse.

(*p*) (1881), 6 App. Ca. 740; 50 L. J. Q. B. 689.

(*q*) *Chauntler v. Robinson* (1849), 4 Ex. 163; 19 L. J. Ex. 170.

(*r*) *Richards v. Rose* (1853), 9 Ex. 218; 23 L. J. Ex. 3; and see *Hide v. Thornborough* (1846), 2 C.

& K. 250; *Solomon v. Vintners Co.* (1859), 4 H. & N. 585; 28 L. J. Ex. 370; *Latimer v. Official Co-operative Society* (1885), 16 L. R. Ir. 305.

(*s*) (1861), 9 H. L. C. 503; 34 L. J. Q. B. 181.

which is, that he will not necessarily be barred by the Statute of Limitations from bringing his action seven or eight years after the defendant's commencing to do that which ultimately resulted in injury to the plaintiff.

Darley
Main Col-
liery case.

The recent case of *Mitchell v. The Darley Main Colliery Company* (*t*), should be carefully studied. The plaintiff was the owner of some land at Darfield, near Doncaster, and in 1867 and 1868, but not afterwards, the defendants worked a seam of coal lying under and near to his land, which subsided in consequence of their excavations. Some cottages of the plaintiff standing on his land were damaged by the subsidence, and were repaired by the defendants. In 1882, a second subsidence of the plaintiff's land occurred, owing to the defendants' workings in 1867 and 1868, and the plaintiff's cottages were again damaged. In an action it was held (finally by the House of Lords) that the plaintiff's right to sue for the damage done to his cottages in 1882 was not barred by the Statute of Limitations (*u*).

Land
supported
by water.

An owner of land has *no right at common law to the support of subterranean water*. There is nothing, therefore, apart from contract, to prevent an adjoining landowner from draining his soil if for any reason it becomes necessary or convenient for him to do so (*x*).

Highway
supported
by wall.

In the case of the *Highway Board of Macclesfield v. Grant* (*y*), the action was brought to recover some money the plaintiffs had spent in repairing a wall supporting their highway. The wall belonged to the defendant, and the plaintiffs thought that, as the defendant and his predecessors had occasionally repaired it, he and his successors ought to go on doing so for ever. The defendant refused, and his objection was supported by Mr. Justice Lopes, who considered that "any repairs done by the defendant or his predecessors in title were done for their own convenience, and not in consequence of any obligation."

Other
cases.

The following cases on the subject-matter of this note should also be consulted:—*Rowbotham v. Wilson* (1860), 8 H. L. C. 348; 30

(*t*) (1885), 11 App. Ca. 127; 55 L. J. Q. B. 529; overruling *Lamb v. Walker* (1878), 3 Q. B. D. 389; 47 L. J. Q. B. 451.

(*u*) In connection with this case, see the case of *Brunsdon v. Humfrey* (1884), 14 Q. B. D. 141; 53 L. J. Q. B. 476, where it was held by the Court of Appeal (dissentiente, Lord Coleridge, C.J.) that a plaintiff, who had recovered damages in the county court for injuries to his

cab, could afterwards sue for personal injuries arising out of the same act of negligence but which did not develop till after the earlier action had been brought, and the very recent case of *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503; 60 L. J. Q. B. 392.

(*x*) *Popplewell v. Hodgkinson* (1869), L. R. 4 Ex. 248; 38 L. J. Ex. 126.

(*y*) (1882), 51 L. J. Q. B. 357.

L. J. Q. B. 49; *Partridge v. Scott* (1838), 3 M. & W. 220; 1 H. & H. 31; *Mundy v. Duke of Rutland* (1883), 23 Ch. D. 81; 31 W. R. 510; *Humphries v. Brogden* (1850), 12 Q. B. 739; 20 L. J. Q. B. 10; *Corporation of Birmingham v. Allen* (1877), 6 Ch. D. 284; 46 L. J. Ch. 673; *Aspden v. Seddon* (1876), 1 Ex. D. 496; 46 L. J. Ex. 353; *Davis v. Treharne* (1881), 6 App. Ca. 460; 50 L. J. Q. B. 665; *Lemaitre v. Davis* (1881), 19 Ch. D. 281; 46 L. T. 407; *Rigby v. Bennett* (1882), 21 Ch. D. 559; 40 L. T. 47; *Normanton Gas Co. v. Pope and Pearson* (1883), 52 L. J. Q. B. 629; 32 W. R. 134; *Love v. Bell* (1884), 9 App. Ca. 286; 53 L. J. Q. B. 257; *Chapman v. Day* (1883), 47 L. T. 705; and *Dixon v. White* (1883), 8 App. Ca. 833.

Nuisances.

SOLTAU *v.* DE HELD. (1851)

[127.]

[2 SIM. N. S. 133; 21 L. J. CH. 153.]

Mr. Soltau was a family man residing in a semi-detached house at Clapham. The adjoining house was, from 1817 to 1848, occupied as a private house, but in the latter year it was bought by a religious order of Roman Catholics, calling themselves "The Redemptionist Fathers," and those gentlemen converted the house into a chapel, and appointed De Held, a Roman Catholic priest, to officiate therein. One of the first acts of Mr. De Held, on entering on the scene of his ministrations, was to set up a harsh and discordant bell, and to ring it at the most unnecessary times. As Soltau, speaking for himself and the neighbours generally, said plainly—"The practice we complain of is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when

members of our household happen to be invalids; it tends also to depreciate the value of our dwelling-houses." This was a complaint emanating, not from the general body of Claphamites, who, being at a greater distance, were more or less indifferent to the matter, but from those who were the greatest sufferers, the immediate neighbours, and it was on this ground of special annoyance that Mr. Soltau was considered entitled to relief.

Public
nuisance,
when
actionable.

Nuisances are divided into two classes, *public* and *private*, and the rule is, that it is only in respect of *the latter* that an action can be brought. A *public* nuisance is suppressed by indictment or information; it is the public that is supposed to be aggrieved by what the defendant has done, and individuals, as individuals, have nothing to do with it. To this rule *Soltau v. Do Held* offers an exception, *viz.*, that when the public nuisance is particularly obnoxious to an individual, it is considered, as far as he is concerned, to be also a private nuisance, and he may bring his action or apply for an injunction. To take a venerable illustration, "*If A. dig a trench across the highway*, this is the subject of an indictment; but *if B. fall into it*, the particular damage thus sustained by him will support an action." The bell-ringing, in so far as it was a nuisance to all Clapham, was a public nuisance; and the proper way to put it down was by indictment or information; but, in so far as it was a nuisance to Mr. Soltau personally, it was a private nuisance, and an action lay. So in *Iveson v. Moore* (z) the obstruction of a highway, so as to prevent customers from coming to a colliery, was held to be an actionable nuisance; and in *Benjamin v. Storr* (a) a coffee-house keeper in a narrow street near Covent Garden successfully went to law with some auctioneers who made an unreasonable use of the highway by their vans blocking up the approaches to his premises and intercepting the light, and by the offensive smells arising from the staling of their horses. But mere delay caused by an obstruction of the highway, or the trouble and expense of removing it, being common to all, will not support an action (b).

Iveson v.
Moore.

Benjamin
v. Storr.

Winter-
bottom v.
Derby.

(z) (1700), 1 Ld. Raym. 486; and see *Fritz v. Hobson* (1880), 14 Ch. D. 542; 49 L. J. Ch. 321.

(a) (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; and see *Rose v. Miles* (1815), 4 M. & S. 101; *Hubert v. Groves* (1794), 1 Esp. 148; and *Rapier v. London Tram-*

ways Co., [1893] 2 Ch. 588; 63 L. J. Ch. 35.

(b) *Winterbottom v. Derby* (1862), L. R. 2 Ex. 316; 36 L. J. Ex. 194; and see *Ricket v. Metr. Ry. Co.* (1867), L. R. 2 H. L. 175; 36 L. J. Q. B. 205.

There is another important practical division of nuisances to which attention is requested, *viz.*, into those which cause damage to *property*, and those which merely cause *personal* discomfort. When a nuisance causes substantial damage to a man's property, he can always get compensation for it; but he must put up with a good deal—there must be a real interference with the comfort of human existence—before he can successfully go to law for an annoyance of the other kind (*c*).

People must not be too fastidious.

A great deal, too, depends on the locality and circumstances. What is a nuisance in one place may not be in another (*d*).

Importance of particular circumstances.

It is no answer to an action for a nuisance that the plaintiff knew that there was a nuisance, and yet went voluntarily and pitched his tent near it (*e*).

Coming to a nuisance.

A man may be responsible for a nuisance, if it were the *probable consequence* of his act, although his intentions were not only innocent but praiseworthy; as, for instance, where a publican erected an urinal, but arranged the premises in such a way that a space left was habitually used for improper purposes (*f*).

Innocent intention no excuse.

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing the acts constituting the nuisance, although the annoyance occasioned by the act of any one of them if taken alone would not amount to a nuisance. The recent case of *Lambton v. Mellish* (*g*) affords a good illustration of this principle. The defendants were rival refreshment contractors at Ashstead Common in Surrey, who, with the view of attracting visitors to their respective merry-go-rounds and refreshment houses, made use of powerful organs. The noise occasioned by these organs was objected to by the plaintiff, a resident in the vicinity, and the Court granted him an injunction restraining both defendants from creating the objectionable noise. "It was said for the defendant," said Chitty, J., "that two rights cannot make a wrong—by that it was meant that if one man makes

Two rights sometimes make a wrong.

(*c*) *St. Helens Smelting Co. v. Tipping* (1865), 11 H. L. C. 642; 35 L. J. Q. B. 66; and see *Crump v. Lambert* (1867), L. R. 3 Eq. 409; affirmed 17 L. T. 133; *Walter v. Selfe* (1851), 4 De G. & Sm. 315; 20 L. J. Ch. 433; *Salvin v. N. Brancepeth Coal Co.* (1874), L. R. 9 Ch. 705; 44 L. J. Ch. 149; *Shotts Iron Co. v. Inglis* (1882), 7 App. Ca. 518; *Walker v. Brewster* (1867), L. R. 5 Eq. 25; 37 L. J. Ch. 33; *Christie v. Davey*, [1893] 1 Ch. 316; 62 L. J. Ch. 439.

(*d*) *Bamford v. Turnley* (1862), 3

B. & S. 66; 31 L. J. Q. B. 286. See also *Broder v. Saillard* (1876), 2 Ch. D. C92; 45 L. J. Ch. 414; *Robinson v. Kilvert* (1889), 41 Ch. D. 88; 58 L. J. Ch. 392; *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685; 58 L. J. Ch. 787.

(*e*) Per Byles, J., in *Hole v. Barlow* (1858), 27 L. J. C. P. 208; 4 C. B. N. S. 331.

(*f*) *Chibnall v. Paul* (1881), 29 W. R. 536. As to a nuisance caused by the collecting of crowds, see *ante*, p. 366.

(*g*) [1894] 3 Ch. 163; 63 L. J. Ch. 929.

a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. . . . In my opinion each is separately liable. . . . I think the point falls within the principle laid down by Lord Justice James in *Thorpe v. Brumfitt* (*h*). That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says: "Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience; but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant. There is, in my opinion, no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. *If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint.*"

Statutory
right to be
a nuisance.

It is a good defence, however, to an action for a nuisance to show that the act complained of was expressly authorized by statute (*i*); and sometimes the defendant may claim an easement which entitles him to annoy the plaintiff. But user which is neither physically preventible by the owner of the servient tenement, nor actionable, cannot found an easement (*k*).

Easement.

Continuing
nuisance.

Where the nuisance is of a continuing kind, so that successive actions may be brought, the jury cannot give damages for anything after the date of the commencement of the action (*l*).

Rever-
sioner
suing for
nuisance.

It is to be observed that when a nuisance is of a permanent nature, or injurious to the reversion, not only the tenant in possession, but the reversioner also, may sue (*m*).

The
Attorney-
General.

In a modern case (*n*) it has been held that the Attorney-General may sue to restrain acts of interference with the public ways without proof of public injury.

Quia timet
action.

In *Fletcher v. Bealey* (*o*), it was held that, in order to maintain a

(*h*) (1873), L. R. 8 Ch. 650.

(*i*) See *Vaughan v. Taff Vale Ry. Co.*, *ante*, p. 413.

(*k*) *Sturges v. Bridgman* (1879), 11 Ch. D. 852; 48 L. J. Ch. 875.

(*l*) *Battishill v. Reed* (1856), 18 C. B. 696; 25 L. J. C. P. 290.

(*m*) *Bedingfield v. Onslow* (1685), 3 Lev. 209; and see *Kidgill v. Moor* (1850), 9 C. B. 364; 19 L. J. C. P. 177; *Young v. Spencer* (1829),

10 B. & C. 145; 5 M. & R. 47; *Cooper v. Crabtree* (1882), 20 Ch. D. 589; 51 L. J. Ch. 544.

(*n*) *The Att.-Gen. v. Shrewsbury Bridge Co.* (1882), 21 Ch. D. 752; 51 L. J. Ch. 746.

(*o*) (1885), 28 Ch. D. 688; 54 L. J. Ch. 424; and see *Ripon v. Hobart* (1834), 3 My. & K. 169; *Att.-Gen. v. Kingston* (1865), 13 W. R. 888; 34 L. J. Ch. 481;

quia timet action to restrain an apprehended injury, the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable. The plaintiff was a paper manufacturer on the Irwell near Manchester, and was terribly afraid of a large heap of refuse which the defendants, who were alkali manufacturers, were depositing on some land a mile or two higher up the river. Though there was a considerable prospect of damage ultimately resulting, it was held that the plaintiff was premature in bringing his action, and an injunction was refused him.

Seduction.

TERRY *v.* HUTCHINSON. (1868)

[128.]

[L. R. 3 Q. B. 599; 37 L. J. Q. B. 257.]

This case illustrates the law with reference to seduction. The plaintiff's daughter had been seduced by the defendant, and the question to be decided was in whose service was the girl at the time the seduction took place, the defendant denying that the daughter was in the service of her father, the plaintiff, at that time. The facts were as follows: the plaintiff's daughter, aged nineteen, was in the service of a draper at Deal. For misconduct in connection with a concert at Deal, her master dismissed her summarily, and she was on her way to her father's house at Canterbury when she was seduced in the railway carriage by the defendant. The Court, upon these facts, held that there was sufficient evidence that the girl at the time of her seduction was in the service of her father, the plaintiff, inasmuch as she was on her way to resume her former position as a

Salvin *v.* North Brancepeth Coal Co. (1874), L. R. 9 Ch. 765; 44 L. J. Ch. 149; Bendelow *v.* Wortley Union (1887), 57 L. J. Ch. 762;

57 L. T. 849; and Att.-Gen. *v.* Manchester Corporation, [1893] 2 Ch. 87; 62 L. J. Ch. 459.

member of her father's family. "The girl," said the Court, "is under twenty-one, and is therefore *prima facie* under the dominion of her natural guardian; and as soon as a girl under age ceases to be under the control of a real master and intends to return to her father's house, he has a right to her services, and therefore there was a constructive service in the present case."

A legal fiction.

Proof of service.

Daughter head of separate establishment.

Governess on a visit home.

Serving two masters.

The action for seduction is based upon a fiction. The plaintiff is supposed to be the *master* of the girl seduced, and to have lost the benefit of her *services* by what the defendant has done to her. It is not necessary, however, for the plaintiff to prove any express contract of service. If he is the father, and his child is under age and not in actual service with someone else, service will be presumed (*p*); and if he is not the father, or the girl is not under age, service will, if she was living under his roof, be presumed from such slight acts of household duty as making tea or milking cows (*q*). On the other hand, if the plaintiff's daughter was, at the time of the seduction, in the service of another man—though that other were himself the seducer—no action would lie (*r*). In *Manley v. Field(s)*, the woman seduced rented a house and carried on the business of a milliner, her mother and the younger members of her father's family residing with her, and receiving part of their support from the proceeds of her business. The furniture in the house belonged to the father, who occasionally visited his family there, and contributed something to their support. It was held on those facts that there *was no evidence of service*. In *Hedges v. Tagg(t)*, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her mother, for the purpose of attending some races at Oxford. During her visit she gave some assistance in household duties. In spite, however, of this fact, it was held she was not in her mother's service, and the action could not be maintained. Moreover, it would appear that where the girl is in the service of one man at the time of the seduction, and of another at the time of the pregnancy and illness, no action lies. The first master could

(*p*) *Evans v. Walton* (1867), L. R. 2 C. P. 615; 36 L. J. C. P. 307.

(*q*) *Bennett v. Alcott* (1787), 2 T. R. 166; *Rist v. Faux* (1863), 4 B. & S. 409; 32 L. J. Q. B. 386.

(*r*) *Dean v. Peel* (1804), 5 East, 45; *Grimmell v. Wells* (1844), 7 M. & G. 1033; 14 L. J. C. P. 19.

(*s*) (1859), 7 C. B. N. S. 96; 29 L. J. C. P. 79.

(*t*) (1872), L. R. 7 Ex. 283; 41 L. J. Ex. 169.

not sue, because there was no illness and loss of service while she was with him; and the second could not, because the woman was not seduced while in his service (*u*).

An action for seduction cannot be successfully brought against a man who, though the seducer, was not the father of the child whose birth occasioned the loss of service (*x*). Seducer, but not father of the child.

A married woman, separated from her husband and living with her father, may be the latter's servant, so that he can maintain an action for seduction (*y*). Married woman.

Although a master may, as a rule, seduce his servant with impunity, it is a question for the jury whether the hiring was *bonâ fide*, or for the express purpose of seduction, as in *Speight v. Olivier* (*z*), where the wealthy defendant kept an empty house for the express purpose of engaging a pretty girl to look after it. Pretended hiring.

Although the action for seduction purports to be only an action for loss of services, that is not the scale on which the damages are calculated. "In point of form," said Lord Eldon, in a seduction case, "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to her child; in such case I am of opinion that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children whose morals may be corrupted by her example" (*a*). The plaintiff may show that the defendant was addressing his daughter as an honourable suitor (*b*), and may show his situation in life (*c*), but not his pecuniary position (*d*). He is not allowed to give evidence of his daughter's good character till the other side try to shake it (*e*). The damages.

In mitigation of damages, evidence of the girl's immodest character or conduct may be given (*f*). The defendant may also show that by encouraging profligate acquaintanceships, the plaintiff is really the author of her own wrong (*g*). Girl's character.

(*u*) *Davies v. Williams* (1847), 10 Q. B. 725; 16 L. J. Q. B. 369; *Gladney v. Murphy* (1891), 26 L. R. Ir. 651; and see *Hedges v. Tagg*, *supra*.

(*x*) *Eager v. Grimwood* (1847), 1 Ex. 61; 16 L. J. Ex. 236.

(*y*) *Harper v. Luffkin* (1827), 7 B. & C. 387; 1 M. & R. 166.

(*z*) (1819), 2 Starkie, 493.

(*a*) *Bedford v. McKowl* (1800), 3 Esp. 119.

(*b*) *Dodd v. Norris* (1814), 3 Camp. 519.

(*c*) *Andrews v. Askey* (1837), 8 C. & P. 7.

(*d*) *Hodsoll v. Taylor* (1873), L. R. 9 Q. B. 79; 43 L. J. Q. B. 14.

(*e*) *Bamfield v. Massey* (1808), 1 Camp. 460.

(*f*) *Verry v. Watkins* (1836), 7 C. & P. 308.

(*g*) *Reddie v. Scoolt* (1795), 1 Peake, 316.

When death is caused by seduction probably no action can be maintained (*h*).

Particu-
lars.

It was decided recently in an action for seduction, that the plaintiff will not be ordered to give particulars of the times and places when the seduction took place, until the defendant has made an affidavit denying the seduction (*i*).

Action for Deceit.

[129.]

PASLEY *v.* FREEMAN. (1789)

[3 T. R. 51.]

This case illustrates the law with reference to representations as to the character, ability, and credit of third parties, and also comprehends all instances where a person has been deceived by the wilful or thoughtless statements of another by trusting to the accuracy of which he has been damnified. The facts were as follows. Pasley, the plaintiff, was a person who dealt in cochineal, and at the time when the cause of action arose had a large stock on hand of which he was anxious to dispose. Freeman, the defendant, hearing of this told Pasley that he knew a Mr. Falch who would purchase the cochineal. Pasley said, "*Is he a respectable and substantial person?*" "*Certainly he is,*" answered Freeman, well knowing he was nothing of the sort. On the faith of this representation Pasley let Falch have sixteen bags of cochineal, of the value of nearly 3,000*l.* on credit. Upon the bill becoming due it turned out that Falch was insolvent, and being unable to recover his money from Falch, Pasley sued Freeman for making to him a false representation whereby he was

(*h*) *Osborn v. Gillett* (1873), L. R. 8 Ex. 88; 24 L. J. Ex. 53.

(*i*) *Thompson v. Birkley* (1883), 47 L. T. 700; 31 W. R. 230.

damnified, and it was held that Freeman was liable to Pasley to the extent that he had suffered in consequence of Freeman's false statement as to the credit and character of Falch.

By the 4th section of the Statute of Frauds, "no action shall be brought upon any promise to answer for the debt, default, or mis-carriage of another, unless such promise is in writing and signed by the party chargeable." Freeman's representation was not in writing, why therefore was he held liable? The reason is this, that section refers only to *contracts*, and Pasley sued Freeman *in tort*, and it is a well-known principle of law, "*that wherever deceit or falsehood is practised to the detriment of another, there the law will give redress.*" Pasley *v.* Freeman was however a substantial violation of the Statute of Frauds, and it gave birth to a progeny of similar cases; till at length Lord Tenterden passed an Act in the ninth year of George the Fourth, which provided that no one who had made any representation as to the "conduct, character, credit, ability," &c., of another in order to induce people to trust him, should be liable to an action for false representation unless his statement were in writing and signed by him. The point cannot be said to be quite settled, but it is probable that to represent a particular property, on the security of which a person was thinking of lending money, to be sound and safe (*e.g.*, to say that a person's life interest in certain trust funds was charged only with three annuities) would be held to be precisely the same thing as representing the man himself to be solvent, for a man's "*ability*" consists in the things that he has (*k*).

Statute of
Frauds,
fourth
section.

Lord Ten-
terden's
Act,
9 Geo. IV.
c. 14.

It was held in Pasley *v.* Freeman that it is no defence to an action of the kind that the defendant had no interest in and was to gain nothing from telling his untruth.

Person re-
presenting,
nothing to
gain.

Thus in the case of Leddell *v.* McDougal (*l*), where the defendant in answer to the plaintiff's letter asking him if he could recommend a man named Thornton as a safe and responsible tenant, had had "*much pleasure in replying affirmatively*" though he knew Thornton to be a man of no resources, and that he had more than once failed in business similar to the one he now wished to enter into, it was held that it was of no consequence that what the defendant had said he had said out of mere kindness and had no idea of

(*k*) Lyde *v.* Barnard (1836), 1 M. & W. 101; 1 Gale, 388; and see Swann *v.* Phillips (1838), 8 Ad. & E. 457; 3 N. & P. 447; and also Joliffe *v.* Baker (1883), 11 Q. B. D.

255; 52 L. J. Q. B. 609.

(*l*) (1881), 29 W. R. 403; and see Hayercraft *v.* Creasy (1801), 2 East, 92.

making a halfpenny out of it, or even of deliberately deceiving the plaintiff.

In *Pearson v. Seligman* (*m*), it was held that it was no defence to prove that the false representation was made for the benefit of the person making it and not for the benefit of the person praised.

Representation need not be direct.

To ground an action for deceit it is not necessary that the false representation should be *made directly to the plaintiff*. It is enough that the defendant intended that the plaintiff should act upon it. If bank directors, for instance, circulate a false report formally addressed to their shareholders, but really intended to catch widows and clergymen with money to invest, a widow or clergyman who has thereby been inveigled into buying shares may sue for the loss she or he has sustained (*n*). But if the plaintiff *did not rely on the false statement* complained of, he cannot maintain an action for deceit (*o*).

What plaintiff must show.

In an action for deceit the plaintiff must show first, that the false statements made to him were fraudulent: secondly, that they were a cause inducing him to act to his prejudice (*p*).

Interest of third parties.

In another case a man for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit which they were told to hold in trust for him. Some of the money having been drawn out with his consent, and the company having been ordered to be wound up while a balance remained: it was held that he could not claim to have the balance paid to him (*q*).

Simplex commendatio.

In the case of *Smith v. Land and House Property Corporation* (*r*), the plaintiffs advertised for sale by auction an hotel stated in the particulars to be held by a "*most desirable tenant*." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant

(*m*) (1883), 31 W. R. 730; 48 L. T. 842.

(*n*) *Scott v. Dixon* (1860), 29 L. J. Ex. 62, n.; and see *Peek v. Gurney* (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19; *Barry v. Crosskey* (1861), 2 J. & H. 1; *Gerhard v. Bates* (1853), 2 E. & B. 476; 22 L. J. Q. B. 364; *Richardson v. Silvester* (1873), L. R. 9 Q. B. 34; 43 L. J. Q. B. 1; *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(*o*) *Smith v. Chadwick*, *post*.

(*p*) *Taylor v. Ashton* (1843), 11 M. & W. 401; 12 L. J. Ex. 363;

Smith v. Chadwick (1884), 9 App. Ca. 187; 53 L. J. Ch. 873; *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459; 55 L. J. Ch. 650; *Derry v. Peek* (1889), 14 App. Ca. 337; 58 L. J. Ch. 864.

(*q*) *In re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616; 54 L. J. Ch. 68; *Hart v. Swain* (1877), 7 Ch. D. 42; 47 L. J. Ch. 5; *Evans v. Edmonds* (1853), 13 C. B. 777; 22 L. J. C. P. 211; *Arkwright v. Newbold* (1881), 17 Ch. D. 301; 44 L. T. 393.

(*r*) (1884), 28 Ch. D. 7; 51 L. T. 718.

could scarcely pay the rent (400*l.*), rates, and taxes. The defendants, relying on the statements in the particulars, authorized the secretary to attend the sale and to bid up to 5,000*l.* The property was bought in at the sale and the secretary purchased it by private contract for 4,700*l.* It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying in answer to the defence and counterclaim for rescission (on the ground of misrepresentation) on the fact that the defendants had made their own inquiries. It was held that the statement that the property was held by a "*most desirable tenant*" could not be treated as "*simplex commendatio*," and that the defendants, having relied thereon, were entitled to rescission of the contract on the authority of *Redgrave v. Hurd* (1881), 20 Ch. D. 1; 51 L. J. Ch. 113.

The directors of a company issued a prospectus inviting subscriptions for debentures stating that the property of the company was subject to a mortgage of 21,500*l.*, but omitting to state a second mortgage of 5,000*l.* The prospectus further stated that the objects of the issue of debentures were (1) to purchase horses and vans; (2) to complete alterations and additions; (3) to supply cheap fish. The true object was to get rid of pressing liabilities. The plaintiff advanced 1,500*l.* upon debentures under the erroneous belief that the prospectus offered him a charge and would not have advanced his money but for such belief, but he also relied upon the false statements contained in the prospectus as to the financial condition of the company. The Court held that the mis-statement of the objects for which the debentures were issued was a material mis-statement of fact, influencing the conduct of the plaintiff and rendered the directors liable to an action for deceit, although the plaintiff was also influenced by his own mistake (*s*).

Omission
in pro-
spectus.

It is not enough to show that the statement in a prospectus is untrue, it may have been merely expressive of sanguine confidence; fraudulent misrepresentation must be shown (*t*). It has recently been decided in the House of Lords in *Derry v. Peck* (*u*) that a false

Fraud
must be
shown.
Derry v.
Peck.

(*s*) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459; 53 L. T. 369.

(*t*) *Bellairs v. Tucker* (1884), 13 Q. B. D. 562; see also *Roots v. Snelling* (1883), 48 L. T. 216.

(*u*) (1889), 14 App. Ca. 337; 58

L. J. Ch. 864. A criticism of this decision by Sir F. Pollock appeared in the *Law Quarterly Review* (1889), p. 410; the case is, on the other hand, supported by Sir W. Anson in the same *Review* (1890), p. 72. See also *Glasier v. Rolls*

statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit. The facts in this case were very simple. A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the company had the right to use steam power instead of horses. The Board of Trade afterwards refused their consent to the use of steam power and the company was wound up. The plaintiff having taken shares on the faith of this statement, brought an action of deceit against the directors, but failed on the ground that the statement as to steam power was made in the honest belief of its truth. In the learned and exhaustive judgment delivered by Lord Herschell will be found a full discussion of the authorities in actions of deceit, and it will well repay a careful perusal. Fraud sufficient to support an action of deceit is proved if it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

Le Lievre
v. Gould.

Reference should be made to the recent case of *Le Lievre v. Gould* (x). Mortgagees advanced money to a builder upon the faith of certain certificates given by a surveyor. The certificates contained untrue statements, the result of the negligence of the surveyor, but there was no fraud on his part, and no contractual relation between him and the mortgagees. It was held, that the surveyor owed no duty to the mortgagees to exercise care in giving the certificates, and that consequently he was under no liability to them. "No doubt," said Lord Esher, M. R., "the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? *A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.* The case of *Heaven v. Pender* (y) has no

(1889), 42 Ch. D. 436; 58 L. J. Ch. 820; *Knox v. Hayman* (1892), 67 L. T. 137; *Angus v. Clifford*, [1891] 2 Ch. 449; 60 L. J. Ch. 443; *Low v. Bouverie*, [1891] 3 Ch. 82;

60 L. J. Ch. 594.

(x) [1893] 1 Q. B. 491; 62 L. J. Q. B. 353.

(y) (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702.

bearing upon the present question. No doubt, if *Cann v. Willson*(z) stood as good law, it would cover the present case. But I do not hesitate to say that *Cann v. Willson* is not now law. A man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. . . . A man who thus acts must have a wicked mind. *But negligence, however great, does not of itself constitute fraud.*"

Of course, a misrepresentation, though not sufficient to support an action of deceit, may be enough to create the right to rescind a contract based upon it(a).

In *Maddison v. Alderson* (b) the plaintiff was induced to serve a man as his housekeeper for many years and to give up other prospects of advancement in life, by a verbal promise made by him to leave her a farm for her life. He signed a will leaving the farm in accordance with his promise; but the will was not duly witnessed. The Lord Chancellor Selborne held that assuming a contract in fact between A. and the appellant, there was no part performance unequivocally referable to a contract so as to exclude the operation of the Statute of Frauds; and that the appellant could not recover the farm from the man's heir.

The fraudulent purpose must be proved by the plaintiff. The active concealment of a material fact, *e. g.*, where the vendor of a house plasters over a defect in the wall, may operate as a misrepresentation(c), but no mere non-disclosure where there is no duty to disclose, as in the diseased pigs case, where the seller declined to give any kind of warranty or representation as to them, but left the purchaser to go entirely by their appearance(d). As to the rescinding of contracts on grounds of fraud, the equity leading cases of *Shirley v. Stratton*(e), *Attwood v. Small*(f), and *Redgrave v. Hurd*(g) should be referred to.

In *Abouloff v. Oppenheimer and Co.*, it was decided that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court cannot be afterwards enforced by him in an action brought in an English Court, even although the question whether the fraud

*Maddison
v.
Alderson.*

*Conceal-
ment of
material
fact.*

*Fraud a
defence to
a foreign
judgment.*

(z) (1888), 39 Ch. D. 39; 57 L. J. Ch. 1034.

(a) See *Adam v. Newbigging* (1888), 13 App. Ca. 308; 57 L. J. Ch. 1066.

(b) (1883), 8 App. Ca. 467; 52 L. J. Q. B. 737.

(c) *Schneider v. Heath* (1813), 3 Camp. 506.

(d) *Ward v. Hobbs* (1878), 4 App. Ca. 13; 48 L. J. Q. B. 281; and see *Fletcher v. Krell* (1872), 42 L. J. Q. B. 55; 28 L. T. 105.

(e) 1 B. R. C. C. 440.

(f) (1838), 6 C. & F. 232.

(g) (1881), 20 Ch. D. 1; 51 L. J. Ch. 113.

had been perpetrated was investigated in the foreign Court, and it was there decided that the fraud had not been committed (*h*).

Omission
in particu-
lars of sale
at auction.

A dwelling-house and offices were put up for sale by public auction, under a printed condition in a common form, that the lot was sold subject to any existing rights and easements of whatever nature—and the printed particulars made no mention of any easement, or of any claim to an easement. As the result of evidence it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumoured existence of some such easement, but forbore to make inquiries. No grant of an easement appeared from the abstract, and its existence was, in fact, disputed on the pleadings. In the auction room the plaintiff's solicitor said he had heard of some such claim, but had no definite information about it, and the auctioneer, in hearing of the plaintiff's solicitor, on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again. Held, that the conditions were misleading and the statements in the auction room insufficient, and specific performance of the contract refused (*i*).

Marriage
settlement.

In an action to set aside a marriage settlement, the plaintiff alleged as the ground of his action that, previous to the execution of the settlement made upon the marriage between himself and J. S., the latter stated to him that her first husband had been divorced from her at her suit, by reason of his cruelty and adultery, and that she had not herself been guilty of adultery; that such statements were made to induce him to execute the settlement and contract the marriage; that in reliance on the representations he executed the settlement and married J. S.; that he subsequently discovered that the representations were false to the knowledge of J. S., that she herself had been divorced from her husband at his suit and by reason of her adultery. Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. r. 4, as disclosing no reasonable ground of action (*k*).

Conceal-
ment of
fraud.
Statutes
of Limita-
tion.

In an action to recover by way of damages money lost by the fraudulent representations of the defendant, a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently

(*h*) (1882), 10 Q. B. D. 295; 52 25 Ch. D. 357; 53 L. J. Ch. 492.
L. J. Q. B. 1. (*k*) *Johnston v. Johnston* (1884),
(*i*) *Heywood v. Mallalieu* (1883), 53 L. J. Ch. 1014; 51 L. T. 537.

concealed by the defendant until within such six years was *held* good by the Court of Appeal (*l*).

The plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's fraudulent representations (*m*). In *Twycross v. Grant* (*n*), where the plaintiff had been induced by the fraud of the defendant to take up shares which were really worthless, he was held entitled to recover the full amount he had paid for them, although they had a market value at the time he took them. In the recent case of *Clarke v. Yorke* (*o*) the question arose whether a plaintiff who had already obtained damages in the county court for false and fraudulent representations could bring an action in the High Court for further damages accrued since judgment in the county court. It was held, by Pearson, J., that he could not do this, as the cause of action was not continuing and his right of action was exhausted.

The common law action to recover damages for the infringement of a trade mark was based upon the ground of fraud (*p*). Trade marks and copyright.

But it is not now necessary—nor was it ever in equity—to prove fraud against a defendant in such a case (*q*). Fraud not essential.

At common law there was no copyright in literary productions *after publication*, but there was *before* (*r*). At common law.

For the present law upon the subject of copyright, see for copyright in *books* 5 & 6 Viet. c. 45. Copyright in *designs* 46 & 47 Viet. c. 57, s. 113. Copyright in *dramatic* productions 3 & 4 Will. IV. By statute.

(*l*) *Gibbs v. Guild* (1882), 9 Q. B. D. 59; 51 L. J. Q. B. 313; see also *Ecclesiastical Commissioners for England v. North Eastern Railway Co.* (1877), 4 Ch. D. 845; 47 L. J. Ch. 20; observed upon, *Barber v. Houston* (1884), 14 L. R. Ir. 273; and see *Betjemann v. Betjemann*, [1895] 2 Ch. 474; 64 L. J. Ch. 641.

(*m*) *Mullett v. Mason* (1866), L. R. 1 C. P. 559; 35 L. J. C. P. 299.

(*n*) (1877), 2 C. P. D. 469; 46 L. J. C. P. 636.

(*o*) (1882), 47 L. T. 381; 31 W. R. 62; see also *Evans v. Collins* (1844), 5 Q. B. 820; 12 L. J. Q. B. 339; *Pontifex v. Bignold* (1841), 3 M. & G. 63; 3 Scott, N. R. 390; *Cornfoot v. Fowke* (1840), 6 M. & W. 358; 4 Jur. 919; *Langridge v. Levy* (1837), 2 M. & W. 519; *Behn v. Burness* (1863), 3 B. & S. 751; 32 L. J. Q. B. 204;

Ormrod v. Huth (1845), 14 M. & W. 651; 14 L. J. Ex. 366; *Sullivan v. Mitalfe* (1880), 5 C. P. D. 455; 49 L. J. C. P. 815; *Eaglefield v. Londonderry* (1876), 4 Ch. D. 693; and on appeal, 38 L. T. 303; *Gover's case* (1875), 1 Ch. D. 182; 45 L. J. Ch. 83; *Cornell v. Hay* (1873), L. R. 8 C. P. 328; 42 L. J. C. P. 136; *Brett v. Clowser* (1880), 5 C. P. D. 376; *Jury v. Stoker* (1882), L. R. Ir. 9 Ch. D. 385.

(*p*) *Rogers v. Nowill* (1817), 5 C. B. 109; 17 L. J. C. P. 52; *Singer Co. v. Wilson* (1876), 2 Ch. D. 434; 45 L. J. Ch. 490.

(*q*) 38 & 39 Viet. c. 91; 39 & 40 Viet. c. 33; 40 & 41 Viet. c. 37 (*The Trade Marks Acts, 1875—1877*).

(*r*) *Albert, Prince v. Strange* (1819), 1 Mac. & G. 25; 18 L. J. Ch. 120; *Reade v. Conquest* (1861), 9 C. B. N. S. 755; 30 L. J. C. P. 269.

c. 15, s. 1; 5 & 6 Vict. c. 45, ss. 2, 20, 22. Copyright in *musical* compositions 45 & 46 Vict. c. 40. Copyright in *newspapers* 44 & 45 Vict. c. 60. Copyright in *pictures* 25 & 26 Vict. c. 68. See also the International Copyright Act, 1886 (49 & 50 Vict. c. 33); and the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

The Court will not define in general terms what amounts to a literary composition which can be protected under the Copyright Acts (s).

Books.

The plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture, which was duly registered under the Copyright Act as a book. The illustrations were engraved from original drawings made by artists employed by the plaintiffs, but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the plaintiffs as an advertisement. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the plaintiffs' book. It was held that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book.

What is a book?

A collection of prints published together in a volume is a book within the meaning of the Copyright Acts and the proper subject of copyright, though it contains no such letterpress as could be the subject of copyright, and it makes no difference that the book is not published for sale, but only used as an advertisement [*Cobbett v. Woodward* (L. R. 14 Eq. 407) overruled] (t).

First publisher.

In the case of *Coote v. Judd* (u) it was decided that registration of copyright is bad if the name entered as that of "the publisher" is not that of the first publisher. In an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence.

Copyright in title of book.

As to the law relating to copyright in the title of a book the case of *Dicks v. Yates* (x) should be referred to.

(s) *Chilton v. Progress Printing Co.*, [1895] 2 Ch. 29; 64 L. J. Ch. 510.

(t) *Maple & Co. v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369; 52 L. J. Ch. 67. See also *Lamb v. Evans*, [1893] 1 Ch. 218; 62 L. J. Ch. 404, where it was held that the headings of a trade directory under which trade advertisements are classified are the subject

of copyright; and that the collocation and arrangement of the advertisements generally was, though each single advertisement was not, the subject of copyright. As to railway guides, see *Leslie v. Young*, [1894] A. C. 335; 6 R. 211.

(u) (1883), 23 Ch. D. 727; 53 L. J. Ch. 36.

(x) (1881), 18 Ch. D. 76; 50 L. J. Ch. 809.

The plaintiff, in *Ager v. Peninsular and Oriental Steam Navigation Co. (y)*, published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation. The book was registered under the Copyright Act, 5 & 6 Vict. c. 45. The defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraph code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation. It was decided that the defendants had infringed the copyright of the plaintiff, and that a perpetual injunction must be granted.

Copyright to "code."

An author and a lecturer upon various scientific subjects, delivered from memory, though it was in manuscript, a lecture at the Working Men's College, upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. P., the author of a system of shorthand writing, and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture and took notes, nearly verbatim, in shorthand, of it, and afterwards published the lecture in his monthly periodical "The Phonographic Lecturer." The Court, on motion for an injunction to restrain the publication, decided that where a lecture of this kind is delivered to an audience limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other; and an injunction was accordingly granted (z).

Public lecture, no right to verbatim publication.

Where a person shall deem himself aggrieved by any entry in the register of copyright, the Court will make an order varying such entry (a).

Person aggrieved by entry.

In *Davis v. Comitti (b)*, it was held that the face of a barometer

Face of

(y) (1884), 26 Ch. D. 637; 53 L. J. Ch. 589; and see *Cable v. Marks* (1882), 52 L. J. Ch. 107; 47 L. T. 432.

(z) *Nicols v. Pitman* (1884), 26 Ch. D. 374; 53 L. J. Ch. 552; and see *Abernethy v. Hutchinson* (1825), 3 L. J. Ch. (O. S.) 209; 1 H. & T. 28; *Caird v. Sime* (1887),

12 App. Ca. 326; 57 L. J. P. C. 2; *Merryweather v. Moore*, [1892] 2 Ch. 518; 61 L. J. Ch. 505.

(a) *Ex parte Poulton* (1884), 53 L. J. Q. B. 320; and see *In re Riviere & Co.'s Trade Mark* (1884), 53 L. J. Ch. 578; 49 L. T. 501.

(b) (1885), 54 L. J. Ch. 419.

barometer not a book. displaying special letterpress was not capable of registration under the Copyright Act, 1842, as not being, within sect. 2, "*a book separately published.*"

Designs. The law upon copyright in designs, as has been pointed out, is governed entirely by the Patents, Designs, and Trade Marks Act, 1883 (*c*), and the reader is referred to this extensive statute for information upon this important branch of the law of copyright.

In *Fielding v. Hawley* (*d*) a butter dish, consisting of a dish and cover, is one "*article of manufacture*" within the Copyright (Designs) Act, 1842, and it is a sufficient compliance with the Act to stamp the registration mark upon the dish alone, though the cover was separate from and not in any way attached to the dish, and though the entire design was upon the cover, and protection is not denied even though in the process of manufacture the mark becomes illegible.

Sculpture. It is provided by 54 Geo. III. c. 56, s. 1, that every person who makes or causes to be made any new and original sculpture, model, copy, or cast of the human figure, or of any animal, or of any animal combined with the human figure, or of any subject being matter of invention in sculpture, is to have the sole right and property in such sculpture, model, copy, or cast for a term of fourteen years. It has been held (*e*), that new and original casts of fruit and leaves are within this section.

Dramatic productions and musical compositions. The publication in this country of a dramatic piece as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece or musical composition, or his assignee, of the exclusive right of representing or performing it (*f*). In another dramatic case the Court of Appeal decided that the person whose right under sect. 20 of 5 & 6 Vict. c. 45, to such sole liberty of representing a musical composition has been infringed is entitled to recover the penalty of 40s. given by sect. 2 of 3 & 4 Will. IV. c. 15, although such musical composition has not been represented at a place of dramatic entertainment (*g*).

An amateur dramatic club gave a performance of a copyright

(*c*) 46 & 47 Vict. c. 57, s. 113. The whole of the cases on this subject are collected and discussed in *Sebastian on Trade Marks, &c.*, 3rd ed. (1890), to which reference should be made.

(*d*) (1883), 48 L. T. 639; 47 J. P. 582. See also *Hollinrake v. Truswell*, [1893] 2 Ch. 377; 62 L. J. Ch. 613, where it was held that a cardboard pattern sleeve containing a scale for adapting it to sleeves of any dimensions was capable of copyright under 5 & 6 Vict. c. 45,

as a chart or plan.

(*e*) *Caproni v. Alberti* (1892), 65 L. T. 785; 40 W. R. 235.

(*f*) *Chappell v. Boosey* (1882), 21 Ch. D. 232; 51 L. J. Ch. 625; and see *Reade v. Conquest* (1861), 9 C. B. N. S. 755; 30 L. J. C. P. 269.

(*g*) *Wall v. Taylor* (1883), 11 Q. B. D. 102; 52 L. J. Q. B. 558; see also *Wall v. Martin*, *ibid.*; and *Fuller v. Blackpool Winter Gardens Co.*, [1895] 2 Q. B. 429; 73 L. T. 242.

play at a hospital for the entertainment of the inmates. Admission was free; the governors of the hospital paid for the seats and costumes; tickets were given to members of the dramatic club to distribute among their friends, and some reporters for the theatrical newspapers attended. It was decided that the performance was not a performance in a "place of dramatic entertainment" within 3 & 4 Will. IV. c. 15, or 5 & 6 Vict. c. 45, s. 20, and that the performers were not liable to pay penalties to the owners of the copyright (*h*).

A newspaper is within the Copyright Act (5 & 6 Vict. c. 45), and requires registration under that Act in order to give the proprietor the copyright in its contents, and so enable him to sue in respect of a piracy of any article therein. Also, to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show, not merely that the author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor (*i*). The several proprietors, however, of several periodicals may jointly employ an author, so that the copyright in the article becomes vested in each after registration of his periodical, when he acquires the right to sue to restrain infringement (*k*).

The registration of the first number of a work published in serial parts is probably a sufficient registration of each of the succeeding parts (*l*).

In *Nottage v. Jackson* (*m*) it was decided that when a firm of photographers send one of their artists to take a negative, he and not they is the author of the photograph. Two or more persons may be registered as "*authors*" of a painting, drawing, or photograph, but *quare* whether the copyright would subsist for the joint lives, or the lives and life of the authors and seven years afterwards.

To constitute an infringement of the copyright of a painting under sect. 1 of the Copyright Act, 1862, the reproduction must be something which is itself in the nature of a picture. Accordingly

(*h*) *Duck v. Bates* (1884), 13 Q. B. D. 843; 53 L. J. Q. B. 338.

(*i*) *Walter v. Howe* (1881), 17 Ch. D. 708; 50 L. J. Ch. 621; *Cox v. Land and Water Journal Co.*, not followed (1869), L. R. 9 Eq. 324; 39 L. J. Ch. 152. And see *Walter v. Steinkopff*, [1892] 3 Ch. 489; 61 L. J. Ch. 521.

(*k*) *Trade Auxiliary Co. v. Middlesbrough, &c. Association* (1889), 40 Ch. D. 425; 58 L. J. Ch. 293;

Cate v. Devon Newspaper Co. (1889), 40 Ch. D. 500; 58 L. J. Ch. 288.

(*l*) See *Johnson v. Newnes*, [1894] 3 Ch. 663; 63 L. J. Ch. 786.

(*m*) (1883), 11 Q. B. D. 627; 52 L. J. Q. B. 760. See also *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; 58 L. J. Ch. 251; *Kenrick v. Lawrence* (1890), 25 Q. B. D. 99; 38 W. R. 779; and *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531.

News-
papers.

Pictures.

a tableau vivant after a painting, so far as it consists of a merely temporary arrangement of living figures, is not a reproduction of the painting or the design thereof within the prohibition of the section (*u*). But a sketch of such a tableau published in an illustrated newspaper may, though the tableau does not, constitute an infringement of the copyright of the picture (*o*).

Trespass ab initio.

[130]

VAUX *v.* NEWMAN. (1611)*(Sometimes called the Six Carpenters' Case.)*

[8 COKE, 146.]

This case illustrates the law with reference to those cases wherein a person empowered by the authority of the law to do certain things, forfeits the protection which is given him by such authority by reason of the abuse of the privilege. The facts in the leading case were as follows: Six carpenters entered a tavern "and did there buy and drink a quart of wine, and then paid for the same." They then gave a further order for "another quart of wine and a pennyworth of bread, amounting to 8d." This order was also fulfilled. For the second supply the men refused to pay. The question was, whether this non-payment made their original entry into the tavern tortious; in other words, whether it made them *trespassers ab initio*.

The Court held that the men did not become *trespassers ab initio* on the ground that mere *non-feasance* is not enough. In order to constitute trespass *ab initio* there must be two conditions. First, there must be *misfeasance*

(*u*) *Hanfstaengl v. Empire Palace* (No. 1), [1894] 2 Ch. 1; 63 L. J. Ch. 417. (*o*) *Hanfstaengl v. Baines*, [1895] A. C. 20; 64 L. J. Ch. 81.

as distinguished from *non-feasance*; and secondly, the authority abused must be one given by *the law*, and not by an individual.

The six carpenters abused an authority given them by the law. The law gives every man a right to enter an inn, and if these men had broken the glasses or actively done some illegal act they would have been guilty of *misfeasance* and have become trespassers *ab initio*; but they were only guilty of *non-feasance*, viz., of declining to pay for their beverage. They did not, therefore, fulfil the conditions essential to trespass *ab initio*. Instances of trespassers *ab initio* may be mentioned: the lessor who enters to view waste and *stays all night*; the commoner who enters to view his cattle and *cuts down a tree*; and the man who enters a tavern and *continues there all night against the will of the landlord*. In such cases that is *misfeasance*, and the authority is conferred by the law. The reason why *misfeasance* does not make a man a trespasser *ab initio* when the authority is conferred by an individual, would seem to be that those who voluntarily give powers can limit or recall them as they please, while the abuse of powers given by the law needs a more stringent protection.

The power of a landlord to distrain his tenant's goods, when the latter will not pay rent, is authority given him *by law*, and had the legislature not intervened and otherwise provided, it would have followed as a corollary from the principles enunciated in the leading case that *misfeasance* in distraining would make a landlord a trespasser *ab initio*.

Such a result would, in many cases, obviously work great hardship, for in an action for illegal distress, where the defendant can be treated as a trespasser *ab initio*, so as to make his possession of the goods wholly wrongful (*a*), the entire value of the goods taken, without deducting the rent satisfied by the seizure, will be recoverable, and not merely the actual damage sustained by the tenant. The plaintiff in such a case can claim to be placed in precisely the same position he was in before the trespass took place. A remedial statute (*b*) has, however, provided that where any distress is made for rent justly due, and an irregularity afterwards occurs on the part of the landlord, the distress is not on that account to be deemed unlawful, nor the persons making it trespassers *ab initio*. In such

(*a*) *Attack v. Bramwell* (1863), 32 L. J. Q. B. 146; 3 B. & S. 520.

(*b*) 11 Geo. II. c. 19, s. 19; and as to distress for poor rate, see 17

Geo. II. c. 38, s. 8. See also the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), and the Rules issued under sect. 8, W. N. Oct. 6th, and Dec. 22nd, 1888.

Who is
trespasser
ab initio.

Examples.

Distress
for rent.

11 Geo. II.
c. 19, s. 19.

case the parties aggrieved may recover full satisfaction for the special damage they have sustained, but no more. Indeed, if no actual damage can be proved by the plaintiff (*c*) he has been held not entitled to nominal damages, although he may have established the fact of an irregularity.

A tenant under an agreement for a lease is liable to distress (*d*).

Excessive
distress.

In *Megson v. Mapleson* (*e*), where a bailiff has levied excessive distress, a landlord may recover from him the amount he has had to pay to the injured tenant. Perhaps the most common form of irregularity is that known as excessive distress. By 52 Hen. III. c. 4, it is enacted that they who take great and unreasonable distress shall be grievously amerced for the excess of such distresses. It is, however, observable that (*f*) no action is maintainable for distraining for more rent than is due, provided the distress is not excessive as to that which is due. Again, a frequent irregularity committed is that of selling the goods without subjecting them to the appraisement required by law, in which case the measure of damages is the value of the goods minus the rent due. Of course, it must not be assumed that a distress can never amount to a trespass *ab initio*. The statute relieves only when the distress is in itself regular and proper, though marred by a subsequent irregularity. Thus it has no application (*g*) where the distress is effected by breaking open an outer door, or (*h*) where it takes place between sunset and sunrise, or where the goods taken were not distrainable at all. Nor, again, where the distress is made after tender of the amount due; but tender after distress and before the goods are impounded makes their detention, but not the original taking, wrongful. And this is not because the statute steps in to relieve the landlord, but because such detention is a mere non-feasance, and would not, therefore, even at common law, render the distress a trespass *ab initio*.

Cattle
damage-
feasant.

It will, too, be remarked that the statute is confined in its application to the case of distraint for rent, and in no way relates, for example, to the distress of cattle damage-feasant, so that the working or killing of such cattle would amount to a trespass *ab initio* on the part of him who had distrained them.

When an animal distrained as *damage-feasant* is impounded on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good, and

(*c*) *Lucas v. Tarleton* (1858), 27 L. J. Ex. 246; 3 H. & N. 116.

(*d*) *Law Journal*, Aug. 1883; *Barrington v. Hamshaw*.

(*e*) (1883), 49 L. T. 744.

(*f*) *Tancred v. Leyland* (1851), 16 Q. B. 669; 20 L. J. Q. B. 205.

(*g*) *Brown v. Glenn* (1851), 16 Q. B. 254; 20 L. J. Q. B. 205.

(*h*) *Sutton v. Darke* (1860), 29 L. J. Ex. 271.

if the distrainer, by demanding an excessive sum for damages as the condition of his release of the animal, obtains payment of such sum from the owner, such payment is not voluntary, and the sum paid may be recovered in an action for money had and received (*i*).

A landlord who has wrongfully evicted his tenant between two quarter days is not entitled to the apportioned rent up to the day of eviction under the Apportionment Act, 1870 (*k*).

Wrongful
eviction
and appor-
tionment.

A landlord may be a trespasser *ab initio* as to part of the things he distrains upon, and not as to the rest, as if there be a seizure of several chattels, some of which are by law seizable and others not, the seizure is illegal only as to the part which it was unlawful to seize. Thus, in one well-known case (*l*), a landlord distrained for rent, amongst other things, certain looms at work. As there was quite sufficient distress on the premises without these looms, they were not by law distrainable, so that so far as regards them the distress was clearly a trespass *ab initio*. The tenant paid the amount of the rent and the costs of the distress, which was then withdrawn. It was held that the seizure of the looms did not illegalise the whole proceeding, and that the tenant was entitled to receive only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him.

Trespass
ab initio
as to part.

In connection with the subject-matter of this note, it is usual to refer to the position of a person having a right of possession in regard to his power of forcible entry on the land. Under an ancient statute (*m*), the assertion of his right, if accompanied by a breach of the peace, amounts to an indictable offence, but the statute does not create any civil remedy (*n*), so that damages cannot be recovered against a rightful owner for a forcible entry on his land. For any independent wrong, however (such as an assault or an injury to the furniture on the premises), committed in the course of the forcible entry (*o*), damages can be recovered even by a person whose possession was wrongful.

Forcible
entry.

The reader is also referred to the cases of *Thwaites v. Wilding* (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; *Ness v. Stephenson* (1882), 9 Q. B. D. 245; 47 J. P. 134; *Ex parte Harris* (1885), 34 W. R. 132.

(*i*) *Green v. Duckett* (1883), 11 Q. B. D. 275; 52 L. J. Q. B. 435.

(*k*) *Clapham v. Draper* (1885), 1 C. & E. 481; and see *Scott v. Brown* (1881), 51 L. T. 746; *Ex parte Sergeant, In re Sander* (1885), 54 L. J. Q. B. 331; 52 L. T. 516.

(*l*) *Harvey v. Pocock* (1843), 11 M. & W. 740; 12 L. J. Ex. 434.

(*m*) 5 Richard II., stat. 1, c. 8.

(*n*) *Newton v. Harland* (1810), 1 M. & G. 644; 1 Scott, N. R. 474.

(*o*) *Beddall v. Maitland* (1881), 17 Ch. D. 171; 50 L. J. Ch. 401.

Actions against Sheriffs, &c.

[131.]

SEMAYNE *v.* GRESHAM. (1605)*(Sometimes called Semayne's Case.)*

[5 COKE, 91.]

Berisford and Gresham were two gay young sparks of the sixteenth century. They were great chums, and lived together in a house, of which they were joint tenants, in the suburb of Blackfriars. Berisford, as is the manner of gilded youth, plunged deeply into debt, and one of the largest and most pressing of his creditors was a Mr. Semayne, to whom he "acknowledged a recognizance in the nature of a statute staple." In these impecunious circumstances he was lucky enough to die, and, by right of survivorship, the ownership of the house in Blackfriars became vested in the bereaved Gresham. Now, in that house were "divers goods" of the late Mr. Berisford, and to these, in virtue of the little formality of the statute staple, Semayne not unreasonably considered himself entitled. Accordingly, he gave instructions to the sheriffs of London to go and do the best they could for him, and those functionaries, armed with the proper writ, set off for Blackfriars. But, when they came to the house, Gresham who had an inkling of what they had come for, shut the door in their faces, "whereby they could not come and extend the said goods." It was for thus "disturbing the execution," and causing him to lose the benefit of his writ, that Semayne brought this action. Much, however, to his surprise and disgust, he did not succeed, for the judges said Gresham had done nothing wrong in locking the front door, and that, even when the king is a party, the

householder must be requested to open the door before the sheriff can break his way in.

Semayne's case is the chief authority for the popular legal maxim which says that every Englishman's house is his castle—*domus sua est cuique tutissimum refugium*—a maxim which, in the lawless times from which our common law comes, was of the utmost importance, for what the law cannot do in that it is weak, a man must do for himself. Houses as castles.

This maxim, however, in common with almost every legal maxim, must be received with very considerable qualifications. Thus, a sheriff or other officer of the law empowered to execute process in a civil suit may, in pursuance of his duty, enter a man's private dwelling-house, although he would not be justified in breaking any outer door or window in order to effect an entrance into the house; and "when the king is a party," as, *e.g.*, in the case of the apprehension of a felon, the officer may enter the house as best he may by breaking the door or otherwise. It must, however, be carefully noted that no such breaking becomes justifiable until the officer, having given due notice of his business, and having demanded admission, has been refused to be allowed to enter the house. Process in civil suit.

Again, a landlord may enter upon the premises of a tenant who has not paid his rent, for the purpose of distraining the tenant's goods. This is, however, subject to certain restrictions, as, for instance, that the distress must take place after sunrise and before sunset. And so, too, although a barn, or outhouse, not connected with the dwelling-house, may be broken open in order to levy an execution, yet it cannot be so broken in order to make a distress for rent (*p*). The distinction has been stated to be "between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes." Capturing felons.

And, as will perhaps be readily supposed, when a house has been recovered by an action of ejectment, the sheriff may break the house and deliver possession to the plaintiff. For, after judgment, the defendant has no longer any right to retain possession of the house. Distress for rent.

Moreover, the rule that "every man's house is his castle" does not apply to protect it from invasion in case his friend, upon a pursuit, takes refuge there or removes his goods thither in order to avoid an execution. After demand of admission and refusal, the sheriff may break open the doors of the house for the purpose of executing the process of the law, but he does so at his peril, and, if Recovery of land.

Sheltering friends.

Sheriff breaking open door.

(*p*) *Brown v. Glenn* (1851), 16 Q. B. 254; 20 L. J. Q. B. 205.

it should turn out that his suspicions were not well founded, the act of breaking amounts to a trespass on his part (*q*). Indeed, it has been said that if the sheriff enters the house of a stranger, even through an open door, he does so at his peril, and, if the goods of which he is in search are not found there, he is a trespasser (*r*). It appears, then, that, although the sheriff cannot break the doors of one's house in the execution of a civil process against one's own goods, he may yet justify a breach for the purpose of seizing the goods of a stranger whose ordinary residence is elsewhere. A house, however, in which a man habitually resides would seem, on principle and on authority, to be on the same footing as his own house so far as executions are concerned, for it is there that one would naturally expect to find him and his goods. The sheriff, therefore, could not break the outer door of such a house to execute any process against the man's goods.

What is a
breaking.

As to what is to be considered a *breaking* of the house, as distinguished from a mere *entry*, the cases are not altogether reconcilable. There are dicta and decisions which would lead to the conclusion that the opening of a door which is simply latched constitutes a breaking on the part of the sheriff; and so, too, if a window be shut, but not fastened, it may not be opened for the purpose of distraining (*s*). Where a pane in a window of the house happened to be broken, it was held that the officer might lawfully put his hand through the aperture in order to make the arrest (*t*).

Execution
good,
though
sheriff
trespasser.

If the sheriff in executing a writ break the house, without authority of law for so doing, and thereby becomes a trespasser, it seems that the execution, nevertheless, is good, and that the injured party has no remedy save an action for trespass against the sheriff. This, at any rate, appears true in respect of an execution against goods. The execution creditor has done no wrong, and, therefore, so much of the sheriff's proceedings as was for his benefit should be considered valid, the rest illegal. An arrest of the person by means of an unlawful breaking has, however, been deemed to be altogether void (*u*), and there is authority for stating that, even in the case of an execution against goods, the Court may, in the exercise of its summary jurisdiction, and in order to prevent an abuse of its process, undo the whole of the proceedings (*x*) and set the execution aside.

(*q*) *Cooke v. Birt* (1814), 5 Taunt. 765; 1 Marsh. 333.

(*r*) Per Dallas, J., in *Cooke v. Birt*, *supra*.

(*s*) *Nash v. Lucas* (1867), L. R. 2 Q. B. 590; 8 B. & S. 531. See *Long v. Clarke*, [1894] 1 Q. B. 119; 63 L. J. Q. B. 108.

(*t*) *Sandon v. Jervis* (1858), E. B. & E. 935, 942; 28 L. J. Q. B. 156.

(*u*) *Kerbey v. Denbey* (1836), 1 M. & W. 336; 2 Gale, 31.

(*x*) See Smith's L. C., vol. i., p. 119.

The reader is referred to the following cases having reference to sheriffs, they are too numerous to be dealt with at large in a book so limited as the present volume :—

Smith *v.* Keal (1882), 9 Q. B. D. 340; 47 L. T. 142. Liability of execution creditor for wrongful seizure under *fi. fa.*—Implied authority of solicitor—Direction to levy upon particular goods.

Royle *v.* Busby (1880), 6 Q. B. D. 171; 50 L. J. Q. B. 196. Sheriff's officer—Abortive execution—Possession money—Who liable to pay.

Hilliard *v.* Hanson (1882), 21 Ch. D. 69; 47 L. T. 342. Wrongful seizure—*Fi. fa.*—Injunction—Costs.

Ex parte Webster, *In re* Morris (1882), 22 Ch. D. 136; 52 L. J. Ch. 375. Costs on appeal from an interpleader order.

Aylwin *v.* Evans (1882), 52 L. J. Ch. 105; 47 L. T. 568. Restraining sale under *fi. fa.*

Smith *v.* Darlow (1884), 26 Ch. D. 605; 53 L. J. Ch. 696. Interpleader—Possession money—Right of appeal.

In re Ludmore (1884), 13 Q. B. D. 415; 53 L. J. Q. B. 418. Poundage—Costs of execution.

Scarlett *v.* Hanson (1883), 12 Q. B. D. 213; 53 L. J. Q. B. 62. Seizure in execution—Equity of redemption—Duty of sheriff—Common Law Procedure Act, 1860, s. 13.

Harvey *v.* Harvey (1884), 26 Ch. D. 644; 51 L. T. 508. Duty in executing writ of attachment.

Crabtree *v.* Robinson (1885), 15 Q. B. D. 312; 33 W. R. 936. Entry by window.

Ex parte Crosthwaite, *In re* Pearce (1885), 14 Q. B. D. 966; 54 L. J. Q. B. 316. Duties of sheriffs as to goods taken in execution.

Willis *v.* Combe (1884), 1 C. & E. 353. A sheriff is not liable for damage to goods, which he has seized under a *fi. fa.*, caused by a mob breaking in and injuring the goods, if he has used reasonable care and diligence respecting them.

In re Purcell (1884), 13 L. R. Ir. 489. Sheriff only entitled to retain fees on amount actually levied.

Hunt *v.* Fenshawe (1883), 12 Q. B. D. 162; 32 W. R. 316. Court may order private sale of goods instead of public auction.

Kelly *v.* Browne (1883), 12 L. R. Ir. 348. False return—Levy—Cheques from debtor—Performance of condition.

Martin *v.* Tritton (1884), 1 C. & E. 226. Liability for seizure—Interpleader order rescinded.

Morris *v.* Salberg (1889), 22 Q. B. D. 614; 58 L. J. Q. B. 275. Direction to sheriff to levy on particular goods—Liability of execution creditor for wrongful seizure by sheriff.

Mitchell *v.* Simpson (1889), 23 Q. B. D. 373; 58 L. J. Q. B. 425. Sheriff's Act, 1887—Duty on commitment of debtor.

In re Priestley (1889), 23 L. R. Ir. 536. Notice of act of bankruptcy—Sale—Deduction of fees and expenses.

Ex parte Essex, In re Levy (1890), 63 L. T. 291; 38 W. R. 784. Right to possession money—Receiving order made before sale—Delay of sale.

Hogarth v. Jennings, [1892] 1 Q. B. 907; 61 L. J. Q. B. 601. Secretary of company not entitled to act as bailiff for the company.

Bagge v. Whitehead, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778. Liability of sheriff for wrongful act of bailiff.

American Concentrated Must Co. v. Hendrey (1893), 62 L. J. Q. B. 388; 68 L. T. 742. Illegal distress—Breaking of outer door—What is peaceable entry.

Hodder v. Williams, [1895] 2 Q. B. 663. Sheriff executing writ of *fiery facias*—Breaking outer door of building not a dwelling-house.

Trover, &c.

[132.]

ARMORY *v.* DELAMIRIE. (1722)

[1 STR. 504.]

A youthful chimney sweeper was fortunate enough to find a very valuable jewel, and he took it to a jeweller's to ascertain its value. The jeweller, taking advantage of the boy's simplicity, told him it was worthless, and offered him three halfpence for it, which the lad declined, and demanded his prize back. The jeweller refusing to return it, the boy went to law with him, and elicited from the judges a favourable decision.

“You have fairly found this jewel,” they said, “and nobody except the real owner has a better title to it than yourself; till he shall appear, you may keep it against all the world, and maintain trover for it.”

Finding
not keep-
ing.

There is very little truth in the time-honoured tradition that *finding is keeping*. The duty of the finder of a jewel, or other article, is to discover, if he can, the person who has lost it; and if he keeps it, knowing perfectly well who that person is, he commits a criminal offence.

This note, however, is concerned with the case where the real owner of the thing found is not ascertainable, and the chief point on which *Armory v. Delamirie* is an authority is as to what is sufficient to enable a person to maintain an action for trover. On this point the recent case of *Barker v. Furlong* (*y*) should be considered. It was there held that trustees having a title to chattels with an immediate right of possession can sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the possession of their *cestui que trust*; and although the title may be liable to be defeated by the claim of some third party, yet the wrongdoer cannot set up the title of that third party as a defence to an action against himself for the recovery of the goods. It is not merely the person in whom resides the right of *property* who can maintain such an action. *Armory* had not that right. It continued in the person who had lost the jewel. All *Armory* had was the right of *possession*; but it was considered that that was quite a sufficient foundation for an action of trover as against a mere wrongdoer. And it may be stated generally that persons entitled to only a special property in goods, or to only a right of possession of the goods, may maintain an action of trover; such as a carrier, or a workman to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shop-keeper, to whom they have been sent to sell, and many others, to whom goods have been delivered for a special purpose (*z*). By way of illustration, the recent case of *Nyberg v. Handelaar* (*a*) may be mentioned. There, the plaintiff was owner of a gold enamel box, and agreed with one *Frankenheim* that the latter should become owner of one-half of the box, but that the plaintiff should retain possession and have the selling of it. The box having remained some time in the hands of the plaintiff, he determined to sell it at *Christie's Auction Rooms*, and for that purpose handed it to *Frankenheim*, who, in turn, handed it to the defendant as security for money owing. The question was whether, under these circumstances, the plaintiff could maintain an action of detinue for the box. In giving judgment for the plaintiff, *Fry, L.J.*, said: "I adhere to the statement made in the old books of practice that detinue can be maintained by any person who has the immediate right to possession of

Who may maintain an action for trover.

(*y*) [1891] 2 Ch. 172; 60 L. J. Ch. 368.

(*z*) *Williams v. Millington* (1788), 1 H. Bl. 81; *Colwell v. Reeves* (1810), 2 Camp. 576; *Martini v. Coles* (1813), 1 M. & S. 140. This

subject is fully dealt with in *Addison's Law of Torts*, 7th ed., pp. 498 *et seq.*

(*a*) [1892] 2 Q. B. 202; 61 L. J. Q. B. 709.

personal chattels which are wrongfully detained from him, whether that right arises out of an absolute or a special property." On the same principle (viz., that mere possession is sufficient as against a wrongdoer) rests a well-known rule in actions of ejectment, namely, that the plaintiff must recover by the strength of his own title, and not by the weakness of his opponent's. Possession, as the popular adage has it, is nine-tenths of the law.

Possession
nine-
tenths of
the law.

Command
can be
denied.

It is on the same principle that the rule in pleading that a *command can be denied* rests. The position the person so pleading takes up is this: "Granted that the person you profess to represent has better right than I have, yet *you don't represent him*; he never told you, for instance, to come and take my cattle. I may not have a right against all the world, but I have a right against you" (*b*).

Jus tertii.

So a defendant in possession may set up a *jus tertii*—that is, the right of a third person—to the lands, to disprove the claimant's alleged right.

Spoilers.

Armory v. Delamirie also illustrates an important maxim of the law,—*omnia presumuntur contra spoliatorem*; that is to say, every presumption shall be made to the disadvantage of a wrongdoer (*c*). *Delamirie* refused to produce the stone when he gave back the socket, so it was presumed as against him to be the best kind of stone that would fit the socket. So, if a man withholds an agreement under which he is chargeable, it is presumed as against him to have been properly stamped (*d*). A person once claimed a debt from another, the proof of which was to be found in certain documents which were sealed up and in his keeping. Without having any business to do so, he broke the seal and opened the bundle of documents. The Court did not in the least doubt that all the papers were before it, and did not doubt the justice of the claim, but the creditor's whole demand was disallowed in *odium spoliatoris*. So where a diamond necklace was missed, and part of it traced to the defendant, who could give no satisfactory account of how it came into his possession, it was held that the whole necklace might be presumed to have come into his hands so that he must pay the full value (*e*).

*Respondent
superior.*

A third point was decided in the leading case, viz., that "a master is answerable for the loss of a customer's property entrusted to his servant in the course of his business as a tradesman." The responsibility of a master for the torts of his servant will be found

(*b*) *Chambers v. Donaldson* (1809), 11 East, 65; *Debree v. Napier* (1836), 2 Bing. N. C. 781; 3 Scott, 201.

(*c*) *Carter v. Bernard* (1849), 13

Q. B. 945.

(*d*) *Crisp v. Anderson* (1815), 1 Stark. 35.

(*e*) *Mortimer v. Cradock* (1843), 12 L. J. C. P. 166; 7 Jur. 45.

treated of under the leading case, *Limpus v. General Omnibus Co.*, *ante*, p. 404.

The case of a sale in *market overt* may be dealt with here. It forms an exception to the rule that no one can acquire a title to a chattel personal from a person who has himself no title to it. A purchaser of chattels (not being a horse) in market overt acquires an indefeasible title to the chattels so purchased, provided he buys in good faith and without knowledge of any defect in the vendor's title (*f*); he may, accordingly, keep stolen goods so purchased. If, however, the thief is prosecuted to conviction, the tables are turned, an Act of Parliament (*g*) expressly providing that in that case the owner shall have his goods restored to him, notwithstanding any intermediate dealing with them; and, indeed, he may then maintain trover for them without waiting for any writ of restitution (*h*). But where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods does not revert in the person who was the owner of the goods by reason only of the conviction of the offender (*i*). No action lies against an innocent purchaser of stolen goods in market overt who disposes of the goods before conviction of the thief (*k*). The innocent purchaser, it has been held, cannot, in answer to a claim for the goods by the owner after the thief has been duly convicted, counterclaim for the cost of their keep while in his possession (*l*). But by 30 & 31 Vict. c. 35, s. 9, the Court which tries the thief may, on his conviction, direct that money found on him shall be paid to the innocent buyer in compensation for his having to give up the property.

In the country the privilege of market overt applies only to those particular days and places which may happen to be specified by charter or prescription. But in London (*i.e.*, the *city*) it applies to every week day (between sunrise and sunset), and every shop, but

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 22.

(*g*) 24 & 25 Vict. c. 96, s. 100; and 56 & 57 Vict. c. 71, s. 24 (1).

(*h*) *Scattergood v. Sylvester* (1850), 15 Q. B. 506; 19 L. J. Q. B. 447; and *R. v. London* (1869), L. R. 4 Q. B. 371; 10 B. & S. 341. See also *Delaney v. Wallis* (1884), 15 Cox, 525; 14 L. R. Ir. 31.

(*i*) 56 & 57 Vict. c. 71, s. 24 (2); overruling *Bentley v. Vilmont* (1887), 12 App. Cas. 471; 57 L. J. Q. B. 18; and *semble* restoring the law of *Moyce v. Newington* (1878), 4 Q. B. D. 32; 18 L. J. Q. B. 125; and in consequence repealing the

Larceny and Summary Jurisdiction Acts, so far as they are inconsistent. See also *Lindsay v. Cundy* (1878), 3 App. Cas. 459; 47 L. J. Q. B. 481; *Babcock v. Lawson* (1880), 5 Q. B. D. 284; 49 L. J. Q. B. 408; *Reg. v. J.J. of Central Criminal Court* (1886), 18 Q. B. D. 311; 16 Cox, C. C. 196; and *Chichester v. Hill* (1882), 48 L. T. 364; 15 Cox, C. C. 258.

(*k*) *Horwood v. Smith* (1788), 2 T. R. 750; 2 Leach, C. C. 586.

(*l*) *Walker v. Matthews* (1881), 8 Q. B. D. 109; 51 L. J. Q. B. 213.

not to a wharf (*m*), nor a showroom over the shop to which customers are only admitted on special invitation (*n*). The sale, however, must be of such articles as are usually dealt in at the shop. Everything, too, must be open and above board; any attempt at concealment (*e.g.*, by the shutters being up, or by the sale taking place at the back of the shop) vitiating the privilege. Nor is the purchaser protected if it is Crown property that he buys, or if he is aware of the defect of title, or, in short, if he is guilty of any fraud in the transaction. The privilege of market overt covers only the sale from shopkeeper to stranger, and does not apply to a sale by a stranger to the shopkeeper (*o*).

Horses.

The property in a horse, even though sold in market overt, does not pass to the buyer unless certain formalities prescribed by some ancient statutes (*p*) have been complied with. To entitle the buyer to anything approaching security, the horse must have been exposed in the open market for a whole hour between 10 a.m. and sunset. Then buyer, seller, and horse must all go together before the book-keeper of the market, who will enter in his note-book every kind of particular about all three. But even when the buyer has undergone this ordeal and paid the money, he can hardly call himself the owner of the horse; because any time within six months of its being stolen, the owner of a horse may put in his claim before a magistrate in the district where it is found, and if he can within forty days get two witnesses to come and swear it is his, may have it back again on tendering to the person in possession of it the sum he paid in market overt.

It is to be observed that goods stolen and sold *out of* market overt may be retaken wherever found, though no step has been taken, or is intended to be taken, to prosecute the thief (*q*). So also if goods stolen are pawned, the owner may maintain trover against the pawnbroker (*r*).

Recent cases on the subject of trover are:—

Johnson *v.* Hook (1883), 31 W. R. 812; 1 C. & E. 89. Measure of damages.

Delaney *v.* Wallis (1884), 14 L. R. Ir. 31, C. A.; 15 Cox, C. C. 255. Sale of stolen goods in market overt.

(*m*) Wilkinson *v.* King (1806), 2 Camp. 335.

(*n*) Hargreave *v.* Spink, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318.

(*o*) See Taylor *v.* Chambers (1605), Cro. Jac. 68; Lyons *v.* De Pass (1840), 11 A. & E. 326; 9 C. & P. 68; Crane *v.* London Dock Co. (1864), 5 B. & S. 313; 10 Jur. N.S. 984; and Hargreave *v.* Spink,

supra.

(*p*) 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12.

(*q*) Peer *v.* Humphrey (1835), 2 A. & E. 495; 4 N. & M. 430.

(*r*) Packer *v.* Gillies (1806), 2 Camp. 336, n.; and see 35 & 36 Vict. c. 93 (Pawnbrokers Act, 1872), sect. 33.

Tyler *v.* L. & S. W. Ry. Co. (1884), 1 C. & E. 285. Goods in custody of police.

Comité des Assureurs Maritimes *v.* Standard Bank of South Africa (1883), 1 C. & E. 87. Right of owner to follow proceeds of sale.

Glyn, Mills, Currie & Co. *v.* East & West India Dock Co. (1882), 7 App. Cas. 591; 52 L. J. Q. B. 146. Liability of warehouseman to holders of bills of lading.

London and County Bank *v.* London & River Plate Bank (1888), 21 Q. B. D. 535; 57 L. J. Q. B. 601. Negotiable securities—holder for value.

Kleinwort *v.* Comptoir National D'Escompte de Paris, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674. Dealing with crossed cheque wrongfully converted.

Henderson *v.* Williams, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308. Liability of Warehousemen. Estoppel of bailor.

Conversion.

HILBERY *v.* HATTON. (1864)

[133.]

[2 H. & C. 822; 33 L. J. Ex. 190.]

Mr. Hilbery, a Liverpool merchant, was the owner of the ship *John Brooks*, which, in 1862, was chartered to take a cargo to Africa. The ship arrived off the coast of Africa, but unfortunately stranded there. The consignee of the cargo took possession of the vessel, and, without any authority, had her put up for sale. One Thompson, the agent of the defendants, some English merchants, finding her going cheaply, bought the ship for his principals, without knowing that the consignee had no business to sell her. The defendants, on being apprised by Thompson of what he had done, wrote back to him—"You do not say from whom you bought her, nor whether you have the register with her. You had better for the present make a

hulk of her." In an action by Hilbery, it was held that there was evidence of a conversion by the defendants, in spite of their circumspection.

What constitutes conversion.

This case is selected as illustrating *the severity with which the law views the intermeddling with another man's property.* The case of *Kirk v. Gregory* (s), where the defendant had removed some jewellery from the room of a dying man under the reasonable fear of its being stolen, may also be referred to. *Hort v. Bott* (t) is also a good illustrative case. An ingenious scoundrel, named Grimmett, persuaded the defendant to indorse to him a delivery order for some barley, which he said had been sent to the defendant by mistake. In spite of his good intentions, which were simply to correct what he believed to be an error, the defendant was held liable.

Since the Judicature Acts abolished the old forms of action, the distinction between "conversion" and "trespass" has become of little or no practical importance. Formerly there must have existed a right to immediate possession in order to found an action for trover; and an owner not entitled to immediate possession had to make use of a special action on the case for any injury to his interest in a chattel, and this means of redress was available, although the act complained of might also be a trespass, conversion, or breach of contract as against the person entitled to the immediate possession. "Conversion" has been defined (u) as "an unauthorised act which deprives another of his property permanently or for an indefinite time." The grievance is the unauthorised assumption of the powers and dominion of the true owner. Thus, if a man, who has no right to meddle with goods at all, removes them from one place to another, an action may be maintained against him for a trespass; but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the person entitled to them, or of exercising some control over them for the benefit of himself or of some other person (v).

Examples. The following are instances of conversion: If a man has possession of my chattel and refuses to deliver it up, knowing or having the means of knowing that I am the owner of it (y); if a

(s) (1876), 1 Ex. D. 55; 45 L. J. Ex. 186.

(t) (1874), L. R. 9 Ex. 86; 43 L. J. Ex. 81.

(u) Per Bramwell, B., in *Hort v. Bott*, *supra*.

(x) See *Falke v. Fletcher* (1865), 18 C. B. N. S. 403; 34 L. J. C. P. 146.

(y) *Baldwin v. Cole* (1705), 6 Mod. 212; *Burroughes v. Bayne* (1860), 5 H. & N. 296; 29 L. J. Ex. 185.

man, who is entrusted with the goods of another, puts them into the hands of a third person contrary to orders; if the pawnee of goods, with a power of sale, sells them before the day stipulated for the exercise of the power of sale has arrived (*z*); if a person, without my permission, takes my horse to ride, and leaves it at an inn (*a*); if a vendor who has sold goods on credit re-sells the goods before the day of payment has arrived (*b*); if a man takes the property of another without his consent, by abuse of the process of the law (*c*); or if a sheriff sells more goods than are sufficient to satisfy an execution, he is liable for a conversion in respect of the excess (*d*).

So, too, the wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state, is a conversion of it, if done by the wrongdoer with the intention of taking to himself the property in the chattel, or deriving some benefit from it, or with the intention of depriving the owner of the possession or use of it (*e*).

Wrongful destruction.

Every one who takes part in the wrongful conversion of another man's property is responsible, even though he is only a servant obeying his master's orders (*f*). "The only question is," said Lord Ellenborough in the case last referred to, "whether this is a conversion in the clerk which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case." The liability of auctioneers and of agents generally in respect of the wrongful conversion of goods depends upon whether they deal with the goods with the view of passing the property in them, or whether they merely settle the price or otherwise act as mere intermediaries between the supposed owner and the purchaser; in the former case they are liable, in the latter case

Servant obeying orders.

(*z*) *Johnson v. Stear* (1861), 15 C. B. N. S. 330; 33 L. J. C. P. 130; *Pigot v. Cudley* (1861), 15 C. B. N. S. 701; 33 L. J. C. P. 134.

(*a*) *Syeds v. Hay* (1791), 4 T. R. 264; 3 Burr. 1264.

(*b*) *Chinery v. Viall* (1860), 5 H. & N. 293; 29 L. J. Ex. 180; *Martindale v. Smith* (1841), 1 Q. B. 389; 1 G. & D. 1.

(*c*) *Grainger v. Hill* (1838), 4 Bing. N. C. 212; 5 Scott, 561.

(*d*) *Aldred v. Constable* (1844), 6 Q. B. 370; 8 Jur. 956.

(*e*) See *Richardson v. Atkinson* (1721), 1 Str. 571; *Simmmons v. Lillystone* (1853), 8 Exch. 431; 22 L. J. Ex. 217.

(*f*) *Stephens v. Elwall* (1815), 4 M. & S. 259.

Responsi-
bility of
auctioneer.

they are not liable (*g*). Thus, in *Cochrane v. Rymill* (*h*), the owner of some cabs let them to a Mr. Peggs, cab-master, under a certain agreement. Mr. Peggs fraudulently got the defendant, an auctioneer, to sell them by auction. Though the auctioneer had thought all the time that the cabs belonged to Peggs, and had acted in a straightforward and correct manner, he was held liable in conversion to the true owner. "The defendant," said the Court, "had possession of these goods; he advertised them for sale; he sold them, and transferred the property in them, and, therefore, from beginning to end he had control over the property; and unless we are prepared to hold contrary to all the definitions of conversion which have been laid down, we must hold that such acts amount to conversion. But the auctioneer will not be held guilty of conversion if he *has not claimed to transfer the title nor purported to sell*, but has simply re-delivered the chattels to the person to whom the man from whom he received them told him to deliver them."

Conversion
proved by
demand
and
refusal.

Where the conversion cannot be proved by any positive act, it may be inferred from proof of a *demand of the goods by the plaintiff, and a refusal to deliver them by the defendant*, he having the control over them at the time (*i*).

Who may
sue.

The owner of goods let to another for a term still continuing cannot maintain an action for conversion (*k*); but *any special or temporary ownership with immediate possession* is sufficient (*l*).

What may
be sued for.

The action lies only in respect of *specific personal property*; therefore not for money unless identified in specie (*m*).

The
damages.

The measure of damages is, in general, the value of the goods. But this is not necessarily so, the damages being *compensation for the loss actually sustained* by the wrongful act (*n*).

Other
cases.

The following cases on this subject may be consulted :—*Spack-*

(*g*) *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; 44 L. J. Q. B. 169; *Barker v. Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; 61 L. J. Q. B. 325, in which *Turner v. Hockey* (1887), 56 L. J. Q. B. 301, was commented on.
(*h*) (1879), 27 W. R. 777; S. C. 40 L. T. 744. Compare with this case, *National Mercantile Bank v. Rymill* (1881), 44 L. T. 767.

(*i*) *France v. Gaudet* (1871), L. R. 6 Q. B. 199; 40 L. J. Q. B. 121; *Philpott v. Kelley* (1835), 3 A. & E. 106; 4 N. & M. 611.

(*k*) *Gordon v. Harper* (1796), 7 T. R. 9; 2 Esp. 465; and see

Milgate v. Kebble (1841), 3 M. & G. 100; 3 Scott, N. R. 358.

(*l*) *Legg v. Evans* (1840), 6 M. & W. 36; 8 D. C. P. 177; *Brierly v. Kendall* (1852), 17 Q. B. 937; 21 L. J. Q. B. 161.

(*m*) *Orton v. Butler* (1822), 5 B. & Ald. 652; and see *Foster v. Green* (1862), 31 L. J. Ex. 158.

(*n*) *Hort v. L. & N. W. Ry. Co.* (1879), 4 Ex. D. 188; 48 L. J. Ex. 545; *Chinery v. Viall* (1860), 5 H. & N. 288; 29 L. J. Ex. 180; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; 42 L. T. 331; and see *Spackman v. Foster* (1883), 11 Q. B. D. 99; 52 L. J. Q. B. 418.

man *v. Foster*, where title deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them, without knowledge of the fraud, to secure the repayment of a loan. The plaintiffs on discovering the loss of the deeds in 1882, demanded them of the defendant, and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations. The Court held that, until demand and refusal to give up the deeds to the real owners, they had no right of action against which the statute would run (*o*). And see *Hardman v. Booth* (1863), 1 H. & C. 803; 32 L. J. Ex. 105; *Cooper v. Chitty* (1756), 1 Burr. 20; 1 Wm. Bl. 65; *Mulliner v. Florence* (1878), 3 Q. B. D. 484; 47 L. J. Q. B. 700; *Jones v. Hough* (1880), 5 Ex. D. 115; 49 L. J. Ex. 211; *Fouldes v. Willoughby* (1841), 8 M. & W. 540; 1 D. N. S. 86; *Glyn v. E. & W. India Dock Co.* (1882), 7 App. Cas. 591; 52 L. J. Q. B. 146; *Lord v. Price* (1874), L. R. 9 Ex. 54; 43 L. J. Ex. 49; *Mathiessen v. London and County Bank* (1879), 5 C. P. D. 7; 48 L. J. C. P. 529.

Defamation.

CAPITAL AND COUNTIES BANK *v.* HENTY. [134.] (1882)

[7 APP. CAS. 741; 52 L. J. Q. B. 232.]

“Messrs. Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank.” The publication of a circular to this effect by some Chichester brewers caused a run on the bank, and an action for libel. But it was held that the circular was not libellous. “It seems to me unreasonable,” said Brett, L.J., “that where there are a number of good interpretations, the only bad

(*o*) See last note.

one should be seized upon to give a defamatory sense to the document."

Definition. A libel may be defined as the malicious publication of untrue
 Libel. defamatory matter by writing, printing, or the like signs, without just cause or excuse.

Slander. Slander consists of defamatory matter merely spoken.

Special damage. An action for *libel* may always be brought when the words published expose the plaintiff to hatred, ridicule, or contempt, or are calculated to injure him in his business.

But, except in four cases, the plaintiff in an action for *slander* must prove *special damage*. The four exceptional cases are:—

(1.) Where the words charge the plaintiff with having committed some criminal offence.

(2.) Where they impute to him a contagious or infectious *disease*.

(3.) Where they are spoken of him as a professional or business man.

(4.) Where they impute unchastity or adultery to a woman or girl (*o*).

In *Riding v. Smith* (*p*), it was held that a grocer and draper, whose wife helped him in the shop, could recover damages for slander charging her with having committed adultery on the premises, there being evidence of loss of custom not accounted for except by the slander.

In *Webb v. Beavan* (*q*), it was held that words imputing that a person has been guilty of a criminal offence will support an action for slander, without special damage, even though the criminal offence imputed is not indictable.

Slander on holders of public offices. Words imputing want of integrity, dishonesty, or malversation to anyone holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se* (*r*). On the other hand, when the words merely impute unsuitableness for the office, incompetency for want of ability, without ascribing any misconduct touching the office, then no action lies, when the office is honorary, without proof of special damage (*s*).

(*o*) See the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), which also provides that "in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action."

(*p*) (1876), 1 Ex. D. 91; 45 L. J. Ex. 281.

(*q*) (1883), 11 Q. B. D. 609; 52 L. J. Q. B. 544; and see *Société Française des Asphaltes v. Farrell* (1885), 1 C. & E. 563; *Simmons v. Mitchell* (1880), 6 App. Cas. 156; 59 L. J. P. C. 11; *Weldon v. De Bathe* (1884), 14 Q. B. D. 339; 54 L. J. Q. B. 113.

(*r*) *Booth v. Arnold*, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443.

(*s*) *Alexander v. Jenkins*, [1892] 1 Q. B. 797; 61 L. J. Ch. 634.

Malice is not really necessary to the plaintiff's case (*t*).

Malice.

To repeat a slander is as actionable as to start it (*u*).

Repetition
of slander.
Innuendo.

When the words used are not actionable in themselves, but by reason of their intended meaning (*e.g.*, if used ironically), an innuendo must be laid, the questions whether the words are capable of the meaning alleged, and whether such meaning is actionable, being *for the Court*, and the question whether the words were used with the alleged meaning *for the jury* (*v*).

Publication to a third party must be proved. The mere sending a man an abusive letter contained in a fastened-up envelope is not actionable (*x*). It is the duty, however, of a person sending a letter which may be libellous to write it himself and mark it private, and if a copy be necessary to copy it himself, otherwise there is publication both to the clerks of the sender and the receiver (*y*).

Publica-
tion.

Depreciatory criticisms, not being false and malicious, by one tradesman on the goods of another are not actionable (*z*).

Criticisms.

Truth is a complete answer to a claim for damages for slander or libel.

Truth.

A corporation may sue for a libel or slander affecting their property, but not for one merely affecting their personal reputation (*a*), but they may (probably) be sued in the same way as an individual.

Corpora-
tions.

As to restraining libels by injunction, see *Hill v. Hart-Davis* (*b*), and *Quartz, &c. Co. v. Beall* (*c*).

Injunc-
tion.

(*t*) *Bromage v. Prosser* (1825), 4 B. & C. 247; 1 C. & P. 475.

(*u*) *Watkin v. Hall* (1868), L. R. 3 Q. B. 396; 37 L. J. Q. B. 125.

(*v*) *Ruel v. Tatnell* (1880), 43 L. T. 507; 29 W. R. 172; *Simmons v. Mitchell*, *ubi supra*; *Williams v. Smith* (1888), 22 Q. B. D. 134; 58 L. J. Q. B. 21; discussed in *Searles v. Scarlett*, [1892] 2 Q. B. 56; 61 L. J. Q. B. 573; and see *Nevill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. 156; 72 L. T. 525; and the leading case.

(*x*) *Phillips v. Jansen*, 2 Esp. 624; *Peacock v. Reynal* (1612), 2 Brown & Gould, 151; 16 M. & W. 825, n.; *Wenhak v. Morgan* (1888), 20 Q. B. D. 635; 57 L. J. Q. B. 241; but see *DeLaeroix v. Therenot* (1817), 2 Stark. 63.

(*y*) *Pullman v. Hill*, [1891] 1 Q. B. 524; 60 L. J. Q. B. 299. This case was distinguished in *Boxsius v. Goldet*, [1894] 1 Q. B. 812; 63 L. J. Q. B. 401, where the occasion was held to be privileged as being a communication made by a solicitor to a third party in the

discharge of his duty to his client. And see *Baker v. Carrick*, [1894] 1 Q. B. 838; 63 L. J. Q. B. 399; and *Pedley v. Morris* (1891), 61 L. J. Q. B. 21; 65 L. T. 526, where it was held that no action will lie against a solicitor for defamatory words contained in written objections lodged by him upon taxation of another solicitor's bill of costs.

(*z*) *Young v. Macrae* 1862, 3 B. & S. 264; 32 L. J. Q. B. 6; *Harman v. Delaney* (1718), 2 Str. 898; *Evans v. Harlow* (1844), 5 Q. B. 624; 13 L. J. Q. B. 130; *W. Counties Manure Co. v. Lanes, &c. Co.* (1874), L. R. 9 Ex. 218; 43 L. J. Ex. 171; and *White v. Mellin*, [1895] A. C. 154; 61 L. J. Ch. 308.

(*a*) *Mayor, &c. of Manchester v. Williams*, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23; *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293. Special damage need not be proved.

(*b*) (1882), 21 Ch. D. 798; 51 L. J. Ch. 845.

(*c*) (1882), 20 Ch. D. 501; 51

Evidence. In an action for libel, evidence of the existence of rumours to the same effect as allegations in the libel is not admissible; nor is evidence of particular acts of misconduct on the part of the plaintiff; but general evidence of his reputation may probably be given in mitigation of damages (*d*).

Slander of title. The action for slander of title, it may be mentioned here, is not strictly an action for defamation, but an action for special damage to the plaintiff by a false and malicious statement affecting his title to property, and it does not matter whether the words are written or spoken (*e*). In this connection the important judgment of the Court of Appeal, delivered by Bowen, L. J., in the recent case of *Ratliff v. Evans* (*f*), should be considered. "That an action will lie," said that learned judge, "for written or oral falsehoods, not actionable *per se* nor even defamatory when they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. . . . The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved."

News-papers. For the law of libel relative to newspapers, see the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888 (*g*).

In *Chamberlain v. Boyd* (*h*), the plaintiff was a candidate for membership of the Reform Club, but upon a ballot of the members was not elected. A meeting of the members was called to consider an alteration of the rules regulating the election of members. The

L. J. Ch. 874; and see *Liverpool Household Stores Association v. Smith* (1887), 37 Ch. D. 170; 57 L. J. Ch. 85; *Bonnard v. Perryman*, [1891] 2 Ch. 269; 60 L. J. Ch. 617; *Salomons v. Knight*, [1891] 2 Ch. 294; 60 L. J. Ch. 743; *Collard v. Marshall*, [1892] 1 Ch. 571; 61 L. J. Ch. 268; and *Monson v. Tussaud*, [1894] 1 Q. B. 671; 63 L. J. Q. B. 454.

(*d*) *Scott v. Sampson* (1882), 8 Q. B. D. 491; 51 L. J. Q. B. 380; and see *Wood v. Durham* (1888),

21 Q. B. D. 501; 57 L. J. Q. B. 547.

(*e*) *Malachy v. Soper* (1836), 3 Bing. N. C. 371; 3 Scott, 723; *Brook v. Rawl* (1849), 4 Ex. 521; 19 L. J. Ex. 114; *Wren v. Weild* (1869), L. R. 4 Q. B. 730; 20 L. T. 277.

(*f*) [1892] 2 Q. B. 524; 61 L. J. Q. B. 535.

(*g*) 44 & 45 Vict. c. 60; 51 & 52 Vict. c. 64.

(*h*) (1883), 11 Q. B. D. 407; 52 L. J. Q. B. 277; and see *Jacobs v. Schmaltz* (1890), 62 L. T. 121.

defendant falsely and maliciously spoke and published of the plaintiff as follows :—"The conduct of the" plaintiff "was so bad at a club in Melbourne, that a round robin was signed, urging the committee to expel" him ; "as, however," he was "there only for a short time the committee did not proceed further;" whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club. It was decided upon demurrer that the claim disclosed no cause of action, for the words complained of, not being actionable in themselves, must be supported by special damage in order to enable the plaintiff to sue; and the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words.

In assessing damages the jury are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time their verdict is given (*i*). Damages.

The Court has power to restrain a person from making slanderous statements, whether oral or written, calculated to injure the business of another (*k*).

The vendor of a newspaper in the ordinary course of his business, though he is *prima facie* liable for a libel contained in it, is not liable if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing that the newspaper was likely to contain libellous matter. If he can prove these facts he is not a publisher of the libel (*l*). As to the question of admitting as evidence other parts of a newspaper to show in what sense the words constituting the alleged libel were used, see *Bolton v. O'Brien* (*m*). For the law upon criminal informations for libel, see *Reg. v. Yates* (*n*). As to particulars, see *Bradbury v. Cooper* (*o*). News-vendors.

Criminal information.

(*i*) *Praed v. Graham* (1889), 24 Q. B. D. 53; 59 L. J. Q. B. 230.

(*k*) *Hermann Loog v. Bean* (1884), 26 Ch. D. 306; 53 L. J. Ch. 1128.

(*l*) *Emmens v. Pottle* (1885), 16 Q. B. D. 354; 55 L. J. Q. B. 51.

(*m*) (1885), 16 L. R. Ir. 97.

(*n*) (1885), 14 Q. B. D. 648; 54 L. J. Q. B. 258. The following recent cases may also be referred to, namely: *Reg. v. Ramsey* (1883),

15 Cox, C. C. 231; 48 L. T. 733; *Reg. v. Labouchere* (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; *Reg. v. London* (1886), 16 Q. B. D. 772; 16 Cox, C. C. 81; *Boaler v. Reg.* (1888), 21 Q. B. D. 284; 16 Cox, C. C. 488; *Reg. v. Adams* (1888), 22 Q. B. D. 66; 16 Cox, C. C. 511.

(*o*) (1883), 12 Q. B. D. 94; 53 L. J. Q. B. 558.

Privileged Communications.

[135.]

HARRISON *v.* BUSH. (1855)

[5 E. & B. 344; 25 L. J. Q. B. 25.]

At Frome, in Somersetshire, there was a contested election, with the usual amount of excitement and party feeling. After it was over, Mr. Bush, an elector of Frome, wrote a letter to Lord Palmerston, who was then Home Secretary, complaining of the conduct of one of the local magistrates during the election, and saying that he had been stirring up and encouraging sedition, instead of putting it down with a strong hand. The magistrate brought this action for libel, but, as Mr. Bush had written his letter with the best intentions and in the discharge of what he considered to be a public duty, he was not successful.

A man must always discharge his duty to society and himself, notwithstanding that it may involve the employment of harsh speech or writing concerning his neighbours; and therefore such speech or writing, even though it happens not to be true, is *privileged*.

Absolute
or condi-
tional.

The privilege may be *absolute* or *conditional*.

Speeches in Parliament (*p*), or in a law Court (*q*), communications relating to state matters made by one officer of state to another in the course of his official duty (*r*), are *absolutely* privileged. So, too, are the statements of witnesses, however irrelevant (*s*).

(*p*) *R. v. Abingdon* (1794), 1 Esp. 227; *Davison v. Duncan* (1857), 7 E. & B. 229; 26 L. J. Q. B. 104; *Goffin v. Donnelly* (1891), 6 Q. B. D. 307; 50 L. J. Q. B. 303; *Davis v. Shepstone* (1886), 11 App. Cas. 187; 55 L. J. P. C. 51.

(*q*) *Scott v. Stansfield* (1868), L. R. 3 Ex. 220; 37 L. J. Ex. 155; *Mackay v. Ford* (1860), 5 H. & N. 792; 29 L. J. Ex. 404; *Munster v. Lamb* (1883), 11 Q. B. D. 58; 52 L. J. Q. B. 726; dissenting from *Kendillon v. Maltby* (1842),

C. & M. 402; 2 M. & R. 438; and *Anderson v. Gorrie*, [1895] 1 Q. B. 668, where it was held that no action lies against a judge of a Court of Record in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice.

(*r*) *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189; 11 T. L. R. 462.

(*s*) *Seaman v. Netherclift* (1876), 2 C. P. D. 53; 46 L. J. C. P. 128;

Ordinary communications, however, are not privileged *absolutely*, but only *primâ facie*; and the rule is that *wherever one person having an interest to protect, or a legal or moral duty to perform, makes a communication to another, such other having a corresponding interest or duty, this communication is primâ facie privileged* (*t*). If, for example, a person of indifferent character were to try to get elected into a respectable club, a member who knew something of his antecedents would be justified in making to the committee, or to another member, such a communication as would insure his being duly pilled. So, too, a master who parts with a servant is justified in telling a person who, with a view to employing the man, inquires about his character, that he is a thief or a drunkard (*u*).

Duty or interest.

In the recent case of *Hunt v. G. N. Ry. Co.* (*x*), the defendants dismissed a servant for alleged negligence, and published his name, offence, and dismissal in a monthly list of punishments for serious offences, which was exhibited in the rooms occupied by their staff throughout their system. In an action by the dismissed servant against the company to recover damages for libel, it was held that, as the company had an interest in informing their servants, and the servants a corresponding interest in learning, that negligence would be followed by dismissal, the occasion of the publication was privileged.

Hunt v. G. N. Ry. Co.

In *Waller v. Loch* (*y*), the plaintiff was the daughter of a deceased officer in the army, and was in distressed circumstances. A subscription list was started for her, and she would have made a good hatful out of it, if somebody, a friend of one of the intending subscribers, had not written to the Charity Organisation Society, of which the defendant was the secretary, for information about her. The society's report was unfavourable,—the lady was an impostor, it said, and a begging-letter writer who lived extravagantly while she was appealing for charity. This report was held to be a privileged communication. "A duty of imperfect obligation," said Cotton, L. J., "attaches on everyone to do what is for the good of

Waller v. Loch.

Dawkins v. Rokeby (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. 8; *Goffin v. Donnelly*, *ubi sup.*

(*t*) See *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54; 63 L. J. Q. B. 587, where it was held that it is not sufficient to make the occasion privileged for the utterer of the defamatory statement honestly to believe that the person to whom he utters it has the necessary interest or duty if such is not really the

fact.

(*u*) See *Davies v. Sneed* (1870), L. R. 5 Q. B. 608; 39 L. J. Q. B. 202; *Webb v. East* (1880), 5 Ex. D. 108; 49 L. J. Ex. 250.

(*x*) [1891] 2 Q. B. 189; 60 L. J. Q. B. 198.

(*y*) (1881), 7 Q. B. D. 619; 51 L. J. Q. B. 274; *Stuart v. Bell*, [1891] 2 Q. B. 311; 60 L. J. Q. B. 577.

society. In that sense it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it when asked by persons who wish to know whether the applicants are deserving objects."

County
councillor.

A county councillor making a defamatory statement at a meeting of the council held for the purpose of hearing applications for music and dancing licences with regard to a person applying for a licence, is not entitled to absolute immunity from liability, but only to the ordinary privilege which applies to a communication made without express malice on a privileged occasion. And this privilege may be rebutted by showing that, from some indirect motive, such as anger or gross and unreasoning prejudice with regard to a particular subject-matter, the defendant stated what he did not know to be true, reckless whether it was true or false (z).

Where an action of libel is brought in respect of a comment on a matter of public interest, the case is not one of privilege, properly so called, and actual malice need not be proved; the question is whether the comment does or does not go beyond the limits of fair criticism (a).

Don't tell
everybody.

But even in those cases where a man has a right to make a communication affecting another's character, *he must take care to make it to the proper person*. He will not be protected against the unpleasant consequences of an action for slander if, as a worthy draper in the Harrow Road did, he goes about telling everybody he meets that So-and-so has been robbing him (b).

Express
malice
destroys
privilege.

Privilege, moreover, is not more than a presumption. It is open to the plaintiff to give proof of *express malice*, and show that the defendant's professed zeal for the public, or the urgent necessity of protecting his interests, is all pretence, and that he really has no other object than to injure the plaintiff (c).

(z) See *Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409.

(a) *Merivale v. Carson* (1887), 20 Q. B. D. 275; 58 L. T. 331. As to what is a "matter of public interest," see *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293.

(b) *Harrison v. Fraser* (1881), 29 W. R. 652; and see *Toogood v. Spyring* (1834), 1 C. M. & R. 181; 4 Tyr. 582; *Tompson v. Dashwood* (1883), 11 Q. B. D. 43; 52 L. J. Q. B. 425, where the letter was sent to the wrong person, but was held privileged, as it

would have been had it been correctly forwarded; *Reg. v. Perry* (1883), 15 Cox, C. C. 169; *Hayward v. Hayward* (1886), 34 Ch. D. 198; 56 L. J. Ch. 287.

(c) *Clark v. Molyneux* (1877), 3 Q. B. D. 237; 47 L. J. Q. B. 230; approved in *Jenoure v. Delmege*, [1891] A. C. 73; 60 L. J. P. C. 11, which also decided that no distinction can be drawn between one class of privileged communications and another; they all imply that the occasion rebuts the inference that the defendant is actuated by *mala fides*, and casts the burden of proving malice on the plaintiff.

Privilege or not, is a question *for the judge*; but express malice or not, is *for the jury* (*d*). Judge and jury.

An interesting case on privilege recently came before the Court of Appeal in *Searles v. Scarlett* (*e*). The defendant published in a trade journal, under the heading "Extracts from the Register of County Courts Judgments," a statement that a county court judgment had been obtained against the plaintiff for a certain amount on a certain day, but immediately under the heading was appended a note to the effect that judgments contained in the list might have been satisfied. The judgment had, in fact, been obtained against the plaintiff, who had satisfied it by payment a few days subsequently, but such satisfaction had not been entered upon the register. In an action for libel, the plaintiff was non-suited, the Court holding that the statement was published on a privileged occasion, and that there was an absence of evidence of express malice on the part of the defendant. *Searles v. Scarlett*.

Another case which may be referred to is that of *Botterill v. Whytehead* (*f*). It having been determined to restore Skirlough Church, an ancient Gothic edifice near Hull, the committee were thinking of putting the work in the hands of Botterill & Co., some Hull architects, when they received a memorial from the defendant, a clergyman, a resident in the neighbourhood, and a member of the Society for the Protection of Ancient Buildings and Monuments, recommending them not to do so, as Botterill & Co. were Wesleyans, and knew nothing about church architecture. It was considered that this letter of the æsthetic clergyman was not entitled to any particular privilege, and the architects were allowed to keep the verdict with substantial damages which the jury had given them. Church architecture.

The fair reports of newspapers are privileged. But in *Stevens v. Sampson* (*g*), it was held that a true report of the proceedings in a court of justice sent to a newspaper *by a person who is not a reporter on the staff of the newspaper* is not privileged absolutely, and that if it be sent from a malicious motive an action will lie. By the Law of Libel Amendment Act, 1888 (*h*), it is provided that "A fair and accurate report in any newspaper of proceedings publicly heard *News-papers*. Newspaper reports of proceed-

(*d*) *Cooke v. Wildes* (1855), 5 E. & B. 328; 24 L. J. Q. B. 367.

(*e*) [1892] 2 Q. B. 56; 61 L. J. Q. B. 573.

(*f*) (1880), 41 L. T. 588.

(*g*) (1879), 5 Ex. D. 53; 49 L. J. Q. B. 120. See also *Macdougall v. Knight* (1889), 14 App. Cas. 194; 58 L. J. Q. B. 537; (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517.

(*h*) 51 & 52 Vict. c. 61. An order of a judge at chambers is now necessary before criminal proceedings can be commenced against a person responsible for the publication of a newspaper for any libel published therein (sect. 8). And there is no appeal from such an order; see *Ex parte Pubbrook*, [1892] 1 Q. B. 86; 61 L. J. M. C. 94.

ings in
Court
privileged.

before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter." (Sect. 3.) (i).

Newspaper
reports of
proceed-
ings of
public
meetings
and of
certain
bodies and
persons
privileged.

A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit. For the purposes of this section "public meeting" shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted. (Sect. 4.)

Power to
defendant
to give
certain
evidence
in mitiga-
tion of
damages.

At the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or has brought actions for) damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought. (Sect. 6.)

(i) *Kimber v. Press Association*, [1893] 1 Q. B. 65; 62 L. J. Q. B. 152.

Every person charged with the offence of libel before any Court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent, but not compellable, witnesses on every hearing at every stage of such charge. (Sect. 9.)

It may be remarked that, even when a communication is privileged, it must be made temperately and judiciously. It is one thing, for instance, to make your communication in a sealed envelope, and another to make it unnecessarily by a telegram, which in the course of its transmission must of course be read and giggled over by a number of clerks (*k*). In a case (*l*) in Ireland it appeared that the defendants, some seed merchants, had applied to a customer for payment with a *post-card*, on which was written—

“*Sir,—Your plea of illness for not paying this trifle is mere moonshine. We will place the matter in our solicitor’s hands if we have not stamps by return, if it costs us ten times the amount.*”

The customer brought an action for libel, and the seed merchants set up the defence of privileged communication; but the Court, following *Williamson v. Freer*, held that the defendants, though the communication might be *prima facie* privileged, had gone beyond their rights in making it by post-card. “*It is difficult*,” said Pilles, C.B., “*to conceive any case in which there can be a necessity to substitute a post-card for a closed letter.*”

Where a person counts the alleged slander by a question, the occasion is privileged (*Palmer v. Hummerston* (1883), 1 C. & E. 36; and see *Jones v. Thomas* (1885), 34 W. R. 104; 53 L. T. 678; *Proctor v. Webster* (1885), 16 Q. B. D. 112; 55 L. J. Q. B. 150).

Torts which are also Crimes.

WELLS *v.* ABRAHAM. (1872)

[136.]

[L. R. 7 Q. B. 554; 41 L. J. Q. B. 306.]

Mr. Wells, becoming impecunious, decided to try and borrow some money. He instructed his wife to take a quantity of jewellery, including a magnificent brooch, to

(*k*) *Williamson v. Freer* (1874),
L. R. 9 C. P. 393; 43 L. J. C. P.
161; and see *Pittard v. Oliver*,
[1891] 1 Q. B. 471; 60 L. J. Q. B.

219.

(*l*) *Robinson v. Jones* (1879), L.
R. Ir. 4 C. L. 391.

the shop of Mr. Abrahams, and get a substantial loan on the security. The negotiations came to nothing, and Abrahams returned a packet purporting to contain the jewellery. When the packet came to be opened, there was no brooch inside, and Mrs. Wells charged Abrahams with having stolen it. Instead, however, of a prosecution for felony, this action of trover was brought against him, and a verdict was found for the plaintiff for 150*l*. The question now was whether the judge ought to have non-suited the plaintiff, on the ground that the facts showed a felonious taking of the brooch, and *Wellock v. Constantine* (*m*) was cited. It was held, however, that the judge was quite right in not having non-suited, for he was *bound to try the issues on the record*.

The supposed rule and its enforcement.

“It is undoubtedly laid down in the text-books,” says Lush, J., in the leading case, “that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; *but by what means that duty is to be enforced we are nowhere informed.*”

Rapes and assaults.

Wellock v. Constantine was an action by a young woman against her master for an *assault*; but when she came into the witness-box her case turned out to be *that she had been raped*, and so the judge non-suited, telling her to go and prosecute her master criminally before she asked a civil court to give her damages.

Wrong to nonsuit.

Ball's case.

Wells v. Abrahams, however, shows that a non-suit under such circumstances is wrong; and what *is* the proper course, no one knows. A perusal of the judgments in the recent case of *Ex parte Ball* (*n*) will show how doubtful and unsatisfactory is the present state of the law. The following remarks of Bramwell, L.J. (in which James, L.J., said that he entirely concurred), though rather long, are quite worth transplanting from the Reports into a text-book:—“In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is, whether, that being so, and no more having been done than has been done towards prosecuting the bankrupt, the trustee in the liquidation of Messrs. Willis & Co., the

View of Bramwell, L. J.

(*m*) (1863), 32 L. J. Ex. 285; 2 H. & C. 146.

(*n*) (1879), 10 Ch. Div. 667; 48 L. J. Bk. 57.

employers, can prove the debt in the bankruptcy. The law on this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that which was not so much *expressed* by Mr. Justice Blackburn, in *Wells v. Abrahams* ^(o), as *to be inferred* from what he said. But though such an opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock v. Constantine* ^(p) and *Ex parte Elliott* ^(q). *Wellock v. Constantine* has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I did so would have been set right; but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reason given for the judgment which I should have desired to give if I had thought there were any good ones to support it. But, at all events, there are the opinions of Chief Baron Pollock and Mr. Justice Willes—opinions which no one who knew those judges will undervalue. Then there is the judgment in *Ex parte Elliott*, besides the expressed opinion for centuries that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways:—1. That no cause of action arises at all out of a felony; 2. That it does not arise till prosecution; 3. That it arises on the act, but is suspended till prosecution; 4. That there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the Court of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shown by *Marsh v. Keating* ^(r), where it was held that prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of a felon *plus* a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested

(o) *Ubi sup.*

(p) (1863), 2 H. & C. 146; 32 L. J. Ex. 285.

(q) (1837), 3 Mont. & A. 110; 2 Deac. 172.

(r) (1834), 1 Bing. N. C. 198; 1 Scott, 5.

that the cause of action is the debt and the prosecution. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose the debtor or his representative sue the creditors, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule *nemo allegans suam turpitudinem est audiendus*. Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the Court to find it out on the pleading? If it appears on the trial is the judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But, again, suppose it can be, what is the result? It has been held that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still, after the continued expression of opinion, and the cases of *Ex parte Elliott* (s) and *Wellock v. Constantine* (t), I should hesitate to say that there is no practical law as alleged by the respondent."

Leslie's
case.

The more recent case of *Ex parte Leslie* (u) in itself hardly touches the point. Some bankers allowed a customer to overdraw, on his depositing some acceptances which turned out to be forgeries, and the question was whether they could prove in his subsequent bankruptcy without having prosecuted. "We have been referred," said Jessel, M. R., with whom the rest of the Court agreed, "to a line of authorities which seem to show that when a claim arises out

(s) *Ubi sup.*

(t) *Ubi sup.*

(u) (1882), 20 Ch. Div. 131; 51 L. J. Ch. 689; and see *Rooke v. D'Avigdor* (1883), 10 Q. B. D. 412; 48 L. T. 761, where it was decided that a statement of claim is not demurrable on the ground

that it shows the cause of action to be a felony. See also *Wickham v. Gatrill* (1854), 2 Sm. & G. 353; 23 L. J. Ch. 783; *Chowne v. Baylis* (1862), 31 Beav. 351; 31 L. J. Ch. 757; *S. v. S. or A. v. B.* (1889), 16 Cox, C. C. 566; 24 L. R. Ir. 235.

of a felony, you cannot sue for it until you have prosecuted the felon, or someone else has prosecuted him, or a prosecution has become impossible. *That may or may not be so; I do not wish to discuss that question on the present occasion.* But, assuming that it is so, the rule has no application to the present case, in which the claim is founded on an independent contract antecedent to the corrupt bargain.”

Doubt suggested by Jessel, M. R., as to existence of rule.

If criminal proceedings have been taken, it is immaterial at whose instance, or with what result they have been conducted (*x*).

It is to be observed that the rule only applies when the action is against the person guilty of the felony. It does not prevent anyone from suing an innocent third party. If somebody has stolen my books and sold them to a bookseller, I may bring an action of trover against the bookseller, though I have not made the faintest attempt at prosecuting the thief (*y*). So a master may be held civilly responsible for a criminal tort of his servant (*z*).

Action against third party.

It is also to be observed that the rule applies only to felonies. For a misdemeanour, such as assault or libel, the aggrieved person may bring an action, quite regardless of the fact that the defendant is really a criminal (*a*).

Rule does not apply to misdemeanour.

Moreover, an action under Lord Campbell's Act may be brought, “although the death shall have been caused under such circumstances as amount in law to felony” (*b*).

Campbell's Act.

There are other cases in which the right of bringing an action is restrained on grounds of public policy. No action, for instance, lies against a commanding officer for acts done in the ordinary course of military discipline (*c*). “*The salvation of this country*,” said the Court in *Johnstone v. Sutton* (*d*), “*depends upon the dis-*

Public policy.

(*x*) *Dudley v. West Bromwich Banking Co.* (1860), 1 J. & H. 11; 2 L. T. 47.

(*y*) *White v. Spettigue* (1815), 13 M. & W. 603; 14 L. J. Ex. 99; and see *Osborn v. Gillett* (1873), L. R. 8 Ex. 88; 42 L. J. Ex. 53; *Lee v. Bayes* (1856), 18 C. B. 599; 25 L. J. C. P. 249; *Stone v. Marsh* (1827), 6 B. & C. 551; R. & M. 361; *Gimson v. Woodfall* (1825), 2 C. & P. 41; *Quinlan v. Barber* (1825), Batty's Irish Rep. 47; *Crosby v. Leng* (1810), 12 East, 409; 1 Hule, P. C. 516; *Hayes v. Smith* (1825), Smith & Batty's Irish Rep. 378.

(*z*) See *Dyer v. Munday*, [1895] 1 Q. B. 742; 61 L. J. Q. B. 118.

(*a*) *Reg. v. Hardey* (1850), 14 Q. B. 529; 19 L. J. Q. B. 196.

(*b*) 9 & 10 Vict. c. 93, s. 1.

(*c*) *Johnstone v. Sutton* (1787), 1 T. R. 493, 784; 1 Bro. P. C. 76; and see *Dawkins v. Rokeby* (1866), 4 F. & F. 896; *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 91; 39 L. J. Q. B. 53; *Freer v. Marshall* (1865), 4 F. & F. 485; and see *The Midland Insurance Co. v. Smith* (1881), 6 Q. B. D. 561; 50 L. J. Q. B. 329, a fire insurance case, where it was decided that the action was maintainable in spite of a felony having been the cause of action and the felon had not been prosecuted.

(*d*) *Supra*.

cipline of the fleet. . . . If this action is admitted, every acquittal before a court-martial will produce one."

In the recent case of *Appleby v. Franklin* (*d*), a paragraph in a statement of claim, which alleged that the defendant after seducing the plaintiff administered to her certain noxious drugs for the purpose of procuring abortion, was lately reinstated, when a Master had struck it out on the ground that it disclosed a felony for which the defendant should have been criminally prosecuted.

Privity.

[137.]

LANGRIDGE *v.* LEVY. (1838)

[4 M. & W. 337.]

Mr. Langridge, senior, walking one day down the streets of Bristol, noticed a gun in a shop window with the following seductive advertisement tied round its muzzle:—

"Warranted, this elegant twist gun by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas; can be had for 25."

He entered the shop, which was the defendant's, and told him he wanted a nice, quiet, steady-going gun for the use of himself and his sons. Finally, he bought the elegant twist gun as warranted.

This warranty was false and fraudulent to the defendant's knowledge, and, shortly after the purchase, one of the young Langridges was using the gun in a perfectly fair and sportsmanlike manner, when it burst and blew off his left hand.

It was this victim of Levy's dishonesty, who now brought an action against him, and the chief point relied

(*d*) (1885), 17 Q. B. D. 93; 55 L. J. Q. B. 129.

on by the defendant's counsel was that, if anyone had a right to bring an action, it was the father, to whom the gun had been sold; as for the son, they said, there was no privity of contract between him and the gunsmith. This defence, however, did not succeed, and the youthful Langridge got as much consolation as money could give him for the loss of his hand.

The decision in this case depended so much upon the special circumstances that there can be deduced from it no wider principle than this, that he who knowingly makes a false statement, intending others to act upon it, is liable for any damage resulting to anyone to whom it may have been intended to be communicated, and who has in fact acted upon it (*e*). The decision proceeded upon the ground of the *knowledge and fraud* of defendant (*f*).

False representation, when actionable.

A particular transaction may sometimes be looked at as affording the right to bring an action either for the breach of contract or in tort. Take, for instance, the too familiar case of a railway disaster caused by the company's negligence: the company are liable to the passenger, in contract, because they gave him a ticket, and in tort, because they were not sufficiently careful in carrying him. In such a case as this there is clearly direct privity between the plaintiff and the defendants.

Privity not always necessary to support an action in tort.

But, generally speaking, privity is not necessary to support an action in tort. In *Langridge v. Levy*, the person with whom the contract was made, and with whom alone there was privity, was the father, and yet the son was allowed to bring an action and recover damages. The reason of this is that *Levy* had been guilty of a tort in making a false representation. If he had made no false representation, he would have only been liable to the father for breach of contract. As it was, he was held liable to the son, who confided in the representation, and who, he knew, was going to use the gun. It is to be observed, however, that if the plaintiff had been a friend of the family, whose use of the gun was not contemplated by *Levy* at the time of the sale, no action could have been successfully maintained (*g*). *George v. Skivington* (*h*), where a chemist sold some poisonous hair-wash for the use of a customer's wife, is a

Poisonous hair-wash.

(*e*) See *Pasley v. Freeman*, *ante*, p. 428.

(*f*) *Winterbottom v. Wright* (1842), 10 M. & W. 109; and see *Haigh v. Royal Mail Steam Packet Co.* (1883), 52 L. J. Q. B. 395, 640; 5 Asp. M. C. 47.

(*g*) *Parry v. Smith* (1879), 4 C. P. D. 325; 48 L. J. C. P. 731; but see *Collis v. Selden* (1868), L. R. 3 C. P. 495; 37 L. J. C. P. 233.

(*h*) (1869), L. R. 5 Ex. 1; 39 L. J. Ex. 8.

subsequent case analogous to *Langridge v. Levy*, with the substitution (per Cleasby, B.) of negligence for fraud.

In *Blakemore v. Bristol and Exeter Railway Co.* (*i*), the Court declared that it had always been considered that *Langridge v. Levy* was not to be extended in its application.

A dangerous lamp.

The cases of *Langridge v. Levy* and *George v. Skivington* must be distinguished from *Longmeid v. Holliday* (*k*), where a tradesman, in all honesty, warranted a defective lamp to be sound. The lamp exploded and injured a person who was not a privy to the contract, but whose use of the lamp had been contemplated by the seller. This person, it was held, could not maintain an action against him; not in contract, because the plaintiff was not privy to the warranty; not in tort, because the defendant, saying only what he believed to be true, was not guilty of any tort.

Contract or tort?

The breach of a duty to use reasonable care may always be treated as a tort, whether or not it is also a breach of contract, and whether the negligence complained of consisted in a positive misfeasance or in an omission (*l*). If a railway company contract with a master to carry his servant, and in doing so are guilty of negligence, which causes bodily hurt to the servant, and consequent damage by loss of service to the master, the company may be sued in contract by the master, and in tort by the servant (*m*). The case of *Berringer v. Great Eastern Railway Co.* (*n*) deserves attention. It was an action by a father, a butcher, for loss of the services of his son, who had helped him in the shop. The boy had taken a ticket from the London, Tilbury, and Southend Railway Co., and was injured at Stepney by the negligence of the defendant company. The point was raised for the defence that there was no privity of contract between the plaintiff and the defendants. But the Court held that the claim was valid, saying, "The claim is against the company, not parties to the contract of carriage, for a pure tort, such as would be committed if a vehicle in the highway

Pure tort.

(*i*) (1858), 8 E. & B. 1035; 27 L. J. Q. B. 167.

(*k*) (1851), 6 Exch. 761; 20 L. J. Ex. 430; and see also the important case of *Heaven v. Pender* (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702; reversing 9 Q. B. D. 302; 51 L. J. Q. B. 465; and as to liability for representations, see *Barry v. Crosskey* (1861), 2 J. & H. 1; *Peck v. Gurney* (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19.

(*l*) See the recent cases of *Taylor v. M. S. & L. Ry. Co.*, [1895] 1 Q. B. 134; 64 L. J. Q. B. 6;

Kelly v. Metropolitan Ry. Co., [1895] 1 Q. B. 944; 72 L. T. 551; and *Meux v. G. E. Ry. Co.*, [1895] 2 Q. B. 387; 73 L. T. 247; which, it is submitted, overrule *Alton v. M. Ry. Co.* (1865), 34 L. J. C. P. 292; 19 C. B. N. S. 213.

(*m*) *Marshall v. York, &c. Ry. Co.* (1851), 11 C. B. 655; 21 L. J. C. P. 34; and see also the case of *Becher v. Great Eastern Ry. Co.* (1870), L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

(*n*) (1879), 4 C. P. D. 163; 48 L. J. C. P. 400.

were wrongfully driven against, or across the path of, another vehicle, whereby a servant therein was hurt and his master lost his services." See also the note to *Thomas v. Rhymney Railway Co.*, *ante*, p. 397; and read the case of *Heaven v. Pender*, cited *ante*; and see *Elliott v. Hall* (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518, injury to servant of vendee: and *Jewson v. Gatti* (1885), 1 C. & E. 564, occupier of premises and strangers; and *Norris v. Catmur* (1885), 1 C. & E. 576, landlord and sub-tenant.

Actions against Magistrates.

CREPPS *v.* DURDEN. (1777)

[138.]

[COWP. 640.]

It was very wrong, of course, of Peter Crepps to be selling hot rolls on a Sunday morning instead of being at church, and as it could not well be called a "work of necessity and charity," it was no doubt a violation of the Act of Charles II., of pious memory. But the Act provides for a fine of 5*s.* only to be inflicted on the offender, and, therefore, that worthy magistrate of Westminster, Mr. Durden, had no business whatever to say that because Crepps had sold four hot rolls he should be fined £1—that is to say, 5*s.* a roll. This was distinctly laid down to him by Lord Mansfield: "The penalty incurred by this offence is 5*s.* There is no idea conveyed by the Act that if a tailor sews on the Lord's Day every stitch he takes is a separate offence. . . . *There can be but one entire offence on one and the same day.*"

The principle of *Crepps v. Durden* was approved and applied in the recent case of *The Apothecaries' Co. v. Jones* (*o*), which arose under sect. 20 of the Apothecaries Act, 1815 (55 Geo. III. c. 194),

(*o*) [1893] 1 Q. B. 89; 67 L. T. 677.

which provides that, if any person "shall act or practise as an apothecary" without having obtained the requisite certificate, "every person so offending shall for every such offence forfeit £20." The defendant had given advice and had prescribed and supplied medicine to three separate persons on different occasions on the same day, without a certificate, and was sued for three separate penalties. It was, however, held that only one offence had been committed, and that only one penalty was therefore recoverable, for the statute contemplated an habitual course of conduct, and not an isolated act.

Milnes
v. Bale.

But in *Milnes v. Bale* (*p*) it was held that, where a person has been guilty of several acts of bribery at a municipal election, he is liable to a penalty in respect of each such act of bribery. "Various decisions," said Brett, J., "were cited as authorities in favour of the contention that there can be only one penalty. If I understand the effect of these cases rightly, in every case where it was held that there could only be one penalty in respect of several acts, it was because all the acts only constituted one offence against which the penalty was enacted. The test, as it appears to me, is whether, having charged the offence against which the penalty is enacted, you can prove it by giving in evidence several distinct acts committed by the person charged. It is not strictly accurate to speak of the penalties as cumulative in such a case as the present. The question is, whether there is one or more offences, and if the offences are distinct, there is only one penalty for each offence. I cannot find that in any case in which each act done was a complete offence in itself, and in which it would have been inadmissible to give other acts in proof of the committal of the same offence, it was held that several penalties could not be inflicted. In the case of *Reg. v. Scott* (*q*), the effect of the decision seems to me to be this: where several oaths are made use of on one occasion it is but one swearing, and consequently there is only one offence, and only one penalty is incurred, though such penalty is cumulative, being at the rate of two shillings for each oath; but if the same set of oaths were used on distinct occasions, though they all occurred on the same day, there would be several offences, and a penalty would be incurred for each distinct swearing. There is no decision that if a man swore at one person at one time of the day, and at another person another time, he would not be liable to two penalties. It seems to me that in such a case he would be liable to two penalties, because there would be two offences. In *Garrett v. Messenger* (*r*)

(*p*) (1875), L. R. 10 C. P. 591; L. J. M. C. 15.
44 L. J. C. P. 336. (*r*) (1867), L. R. 2 C. P. 583;
(*q*) (1863), 4 B. & S. 368; 33 36 L. J. C. P. 337.

the offence charged was keeping open an unlicensed house. It is not keeping it open for an hour that is the offence; the offence is the keeping a house to be used as a house of entertainment without a licence, which is a comprehensive offence, to be proved by many acts. According to the case of *Marks v. Benjamin*(s), it is necessary in the case of a charge of this sort to give evidence of more than having the house open for a short period, or in a particular instance. In such a case a penalty cannot be imposed for each act, because each act is not a separate offence. So in *Pilcher v. Stafford*(t) the ground of the decision was that there was only one offence, viz., leaving a child unvaccinated for a certain period, and consequently there could only be one penalty. Again, in *Crepps v. Durden*, the offence contemplated was exercising the party's ordinary calling on Sunday. It was not the doing of one isolated act that would be evidence of the committal of the offence, but several acts might be given in evidence to prove one offence. All these decisions are inapplicable to the present case, because each act of bribery is a complete offence in itself."

As to actions against magistrates, the reader is referred to 11 & 12 Vict. c. 44, "An Act to protect justices of the peace from vexatious actions for acts done by them in the execution of their office." It is sufficient here to point attention to the first two sections of this Act, which provide that if the act complained of was done by the magistrate as to any matter *within his jurisdiction*, the plaintiff must show that he acted *maliciously and without reasonable and probable cause*, and that if it was done in a matter in which the magistrate had *no jurisdiction*, or if he *exceeded his jurisdiction*, the plaintiff must show that the conviction or order has been quashed.

Actions
against
justices.

Other sections of this Act specify the time within which the action is to be brought, the notice of action required, the way and effect of tendering amends, &c., and in various other ways the justice of the peace is hedged about and protected against litigious evil-doers.

It may be mentioned that the jurisdiction of justices at petty sessions is generally ousted if a *bonâ fide* claim of right is put forward by the defendant. This subject, however, is not sufficiently connected with *nisi prius* to merit discussion at any length here; and the reader is referred to the following cases:—*Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582; 44 L. J. M. C. 178; *Reg. v. Pearson* (1870), L. R. 5 Q. B. 237; 39 L. J. M. C. 76; *White v. Fox* (1880), 49 L. J. M. C. 60; 44 J. P. 618; *White v. Feast* (1872), L. R. 7 Q. B. 353; 41 L. J. M. C. 81; *Denny v. Thwaites* (1876),

Claim of
right.

(s) (1839, 5 M. & W. 565; 3 Jur. 1194. (t) (1864), 4 B. & S. 775; 33 L. J. M. C. 113.

2 Ex. D. 21; 46 L. J. M. C. 141; *Reece v. Miller* (1882), 8 Q. B. D. 626; 51 L. J. M. C. 64; and *Pearce v. Scotcher* (1882), 9 Q. B. D. 162; 46 L. T. 342; *R. v. Young, Ex parte White* (1883), 52 L. J. M. C. 55; 47 J. P. 519.

Notice of Action.

[139.]

ROBERTS *v.* ORCHARD. (1864)

[2 H. & C. 769; 33 L. J. Ex. 65.]

Mr. Orchard was a draper in Argyle Street, London, and the plaintiff had been one of his shopmen. While so employed, Mr. Orchard suspected him of helping himself to a florin on a certain occasion, and gave him into custody. The magistrates, however, thought there was no evidence against the man, and at once discharged him. This was an action for assault and false imprisonment, and the great question was whether the defendant ought to have had notice of action, as provided by 24 & 25 Vict. c. 96, s. 113. That Act of Parliament says that any person “*found committing*” any offence punishable by virtue of that Act, with the exception of angling in the day-time, may be immediately apprehended without a warrant. It was held that it was not sufficient to entitle the defendant to notice of action that he believed the plaintiff to have *dishonestly taken* the florin; he was not entitled to such notice unless he believed that the plaintiff had been “*found committing*” the offence. The proper question to be left to the jury in such a case was—Did the defendant honestly believe in the existence of those facts, which, if they had existed, would have afforded a justification under the statute?

A great number of statutes, with the object of protecting persons filling public offices or discharging public duties, require that a

month's notice shall be given before an action can be commenced against them.

As to the form of the notice, the statute requiring it should in each instance be consulted. Speaking generally, however, it may be said that it is sufficient if it conveys to the mind of the defendant reasonable information of what the complaint is. In a recent case a man went to law with a Lancashire Local Board for an injury to his horse, caused by part of the road over which it was being driven suddenly giving way (*u*). In the notice of action which, by the Public Health Act, 1848 (11 & 12 Vict. c. 63), he was bound to give, the plaintiff only complained of the defendants' *non*-feasance, whereas he was really suing them for *mis*-feasance. But it was held that the notice was sufficient in spite of the omission. "The object of a notice of action," said the Court, "is to enable a party to tender amends; and therefore it is sufficient if it states substantially the nature of the complaint." In the case of *Green v. Hutt* (*x*) an inaccuracy as to the date of arrest in a notice under 24 & 25 Vict. c. 96, s. 113, was held to be pardonable, and the judge who had nonsuited in consequence to be wrong.

Form of notice.

Inaccurate date.

In the absence of agreement as to the amount and mode of payment (*y*), a solicitor cannot begin an action for his fees till a calendar month after he has sent in a *signed bill of costs* (*z*). The client, however, to whom an unsigned bill is delivered may waive the want of signature and adopt it (*a*).

Solicitor suing for costs.

In *Stone v. Hyde* it was decided that the notice of action under sect. 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), need not be expressed in strictly technical language; it is enough if it substantially conveys to the mind of the person to whom it is given the name and address of the person injured and the cause and the date of the injury. A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had, for some time past, been under treatment at a hospital "*for injury to his leg*." This defect in the notice did not render it invalid (*b*).

Employers' Liability Act.

In *Foat v. Mayor, &c., of Margate*, it was laid down that in an action for the recovery of land one month's notice need not be given

Public Health Act, 1875.

(*u*) *Smith v. West Derby Local Board* (1878), 3 C. P. D. 423; 47 L. J. C. P. 607.

(*x*) (1882), 51 L. J. Q. B. 640; 46 L. T. 888.

(*y*) See 33 & 34 Vict. c. 28, s. 15. 6 & 7 Vict. c. 73, s. 37.

(*z*) *In re Gedye* (1851), 11 Beav. 56; 20 L. J. Ch. 110; and *Billing v. Coppock* (1847), 1 Ex. 15; 16

L. J. Ex. 265; and see *Ingle v. McCutchan* (1884), 12 Q. B. D. 518; 53 L. J. Q. B. 311; *Penley v. Anstruther* (1883), 52 L. J. Ch. 367; 48 L. T. 661.

(*b*) (1882), 9 Q. B. D. 76; 51 L. J. Q. B. 452; *Clarkson v. Musgrave* (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525. And see *ante*, p. 395.

to the local authority, as is the statutory rule in other cases; it being decided that sect. 264 of the Public Health Act, 1875, does not apply to actions for the recovery of land (c).

A constable acting under the Contagious Diseases (Animals) Act is not entitled to notice of action, as 1 & 2 Will. IV. c. 41 applies only to cases where the authority by which a constable acted was given by the common law or by some statute existing when 1 & 2 Will. IV. c. 41 was passed (d).

The following recent cases may also be referred to, namely:—

Union Steamship Co. of New Zealand *v.* Melbourne Harbour Commissioners (1884), 9 App. Cas. 365; 53 L. J. P. C. 59, as to the adequacy of a notice of action. *Sellers v. Matlock Bath Local Board* (1885), 14 Q. B. D. 928; 52 L. T. 762; following *Flower v. Local Board of Low Leyton* (1877), 5 Ch. D. 347; 46 L. J. Ch. 621, deciding that where the principal object of an action against a local board of health is an injunction to restrain an immediate injury, it is not necessary to give notice under the 264th section of the Public Health Act, 1875. And it makes no difference that damages are claimed by way of subsidiary relief.

Lea v. Facey (1887), 19 Q. B. D. 352; 56 L. J. Q. B. 536, where it was held that a person who is in fact disqualified from being a member of a local authority, but who acts in the *bonâ fide* belief that he is a member, is entitled to notice of action under sect. 264 of the Public Health Act, 1875.

Hardy v. North Riding Justices (1886), 50 J. P. 663.

Chapman v. Auckland Union (1889), 23 Q. B. D. 294; 58 L. J. Q. B. 504, where damages were given in substitution for an injunction against a sanitary authority, though no notice of action had been given. *Bowen, L.J.*, said: "The question which the judge must consider, in order to determine whether notice of action is necessary, is whether the real object of the action is protection for the future, or merely damages for the past."

(c) (1883), 11 Q. B. D. 299; 52 L. J. Q. B. 711; and see *Midland Ry. Co. v. Withington Local Board* (1883), 11 Q. B. D. 788; 52 L. J.

Q. B. 689.

(d) *Bryson v. Russell* (1884), 14 Q. B. D. 720; 54 L. J. Q. B. 144.

Malicious Prosecution and False Imprisonment.

LISTER v. PERRYMAN. (1870)

[140.]

[L. R. 4 H. L. 521 ; 39 L. J. Ex. 177.]

Mr. Lister was the owner of a rifle, which was left under the charge of his coachman, Hinton. One day a man named Perryman happened to call on Hinton, and, seeing the rifle, exclaimed what a capital one it was, and how much he would like to have just such another. Not long afterwards the rifle was missed. Hinton reported the loss to his master, and at the same time informed him that one Robinson, the coachman of a gentleman living in the neighbourhood, had seen it in a barn where Perryman lived, and had asked him what he was doing with Lister's gun, to which Perryman had replied, "It is not Lister's gun ; it is my gun ;" but that Robinson said he was sure the gun he saw was the one Lister had missed. Hinton added that he had since gone with Robinson to Perryman's and had been shown a gun which was not Lister's, and which Perryman said was the only gun he had. Perryman, having been tried and acquitted on the charge of stealing the rifle, now brought an action for false imprisonment. The judge at the trial directed the jury that, as Lister had not seen Robinson before causing Perryman to be arrested, he had acted on hearsay evidence alone, and without "reasonable and probable cause." This, however, was held to be a misdirection, on the ground that Lister had "reasonable and probable cause" for instituting a prosecution ; and the principle was distinctly affirmed that *it is for the jury to find the facts on which the question of reasonable and probable cause depends,*

but for the judge to determine whether the facts found do constitute reasonable and probable cause.

Although somewhat analogous, and sometimes confounded, actions for malicious prosecution and for false imprisonment are perfectly distinct, and a person is frequently liable to the one and not to the other. "The distinction between false imprisonment and malicious prosecution," said Willes, J., in *Austin v. Dowling* (e), "is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment."

Four
points.

In an action for malicious prosecution the plaintiff must prove four things :—

1. The
prosecu-
tion.

(1.) *That the defendant preferred a criminal charge against him before a judicial officer.*

But if a person, acting conscientiously and like an honest man, comes before a magistrate and makes his complaint, and the magistrate foolishly treats as a felony what is really only a civil matter, and issues his warrant accordingly, the person making the complaint is not answerable for the magistrate's mistake (f). So where a doctor in Lancashire, having missed two pairs of horse clippers from his stables, sent for a policeman, and said, "*I have had two pairs of clippers stolen from me, and they were last seen in the possession of Danby,*" whereupon the policeman, having made inquiry, and without communicating with the doctor, arrested Danby, who had to appear before the magistrates and was committed for trial, it was held that there was no evidence that the doctor was the prosecutor, and therefore he was not liable in an action for malicious prosecution (g).

Danby v.
Beardsley.

2. Malice.

(2.) *That the defendant acted maliciously.*

"In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury" (h). But if the defendant acted without reason-

(e) (1870), L. R. 5 C. P. 534; 39 L. J. C. P. 260; and see also *Cahill v. Fitzgibbon* (1885), 16 L. R. Ir. 371.

(f) *Leigh v. Webb* (1800), 3 Esp. 165; *Wyatt v. White* (1860), 5 H. & N. 371; 29 L. J. Ex. 193; and see *Clarke v. Postan* (1834), 6 C. &

P. 423.

(g) *Danby v. Beardsley* (1881), 43 L. T. 603.

(h) Per Hawkins, J., in *Hicks v. Faulkner* (1878), 8 Q. B. D. 167; affirmed 46 L. T. 127; and see also *Harrison v. National Provincial Bank* (1885), 49 J. P. 390.

able and probable cause, the jury will not *generally* have much difficulty in arriving at the conclusion of malice (*i*). But, on the other hand, it would not do the plaintiff any good to prove *malice alone*, for a person may be actuated by the bitterest malice and yet have plenty of ground for prosecuting. Malice is proved, for example, by showing that the defendant *did not really himself believe in the plaintiff's guilt*, or by it appearing that what he really wanted was not to punish crime (as the theory of our law is that all prosecutors wish primarily to do), but *to enforce payment of a debt* (*k*). A prosecution which is not malicious when begun, may become so by the prosecutor *discovering that the defendant is really innocent and yet going on* with the criminal proceedings (*l*).

Subsequent malice.

The better opinion, perhaps, is that an action for malicious prosecution will lie against a company where the wrongful act was done by one of their servants in the course of his employment, and in the supposed interest of his employers (*m*).

(3.) That the defendant acted *without reasonable and probable cause*.

3. Reasonable and probable cause.

Whether there was reasonable and probable cause is, when the facts are found, a *question of law* for the judge. Hawkins, J., has very lucidly summarised the principles on which a judge ought to act in deciding this question in the recent case of *Hicks v. Faulkner* (*n*), where it was held that, even though a man might through a defective memory have forgotten a particular occurrence, the recollection of which would have restrained him from instituting criminal proceedings, still, if it was reasonable under the circumstances that he should trust to his memory, he ought to be excused. But the learned judge expressly points out that "it would be unreasonable to rely either on an informant known to be

Hicks v. Faulkner.

(*i*) But see *Brown v. Hawkes*, [1891] 2 Q. B. 718; 61 L. J. Q. B. 151; where it was held, that although the absence of reasonable and probable cause is sometimes evidence of malice, yet it is not evidence of malice when the prosecutor honestly believes in the charge.

(*k*) See *Hinton v. Heather* (1845), 14 M. & W. 131; 15 L. J. Ex. 39; *Broad v. Ham* (1839), 5 Bing. N. C. 722; 8 Scott, 40; *Brooks v. Warwick* (1818), 2 Stark. 389; *Haddrick v. Heslop* (1848), 12 Q. B. 267; 17 L. J. Q. B. 313; and *Heslop v. Chapman* (1853), 23 L. J. Q. B. 49; 18 Jur. 348.

(*l*) *FitzJohn v. Mackinder* (1861), 9 C. B. N. S. 505; 30 L. J. C. P. 257.

(*m*) *Edwards v. Midland Ry. Co.* (1880), 6 Q. B. D. 287; 50 L. J. Q. B. 281. Lord Bramwell has recently expressed a strong opinion to the contrary in *Abrath v. N. E. Ry. Co.* (1886), 11 App. Ca. 247; 55 L. J. Q. B. 457; but, as pointed out by Lords Selborne and Fitzgerald, this is only a dictum. And see *Kent v. Courage* (1891), 55 J. P. 264; and *Rayson v. South London Tramways Co.*, [1893] 2 Q. B. 304; 62 L. J. Q. B. 593.

(*n*) *Ubi sup.* See *Brown v. Hawkes, supra*.

untrustworthy, or a memory known to be unreliable, *without express confirmation.*"

Hope *v.*
Evered.

In *Hope v. Evered* (*o*), a case under sect. 10 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), it was held that the justice has a judicial duty to perform, and that his decision that there is reasonable cause for suspicion is a protection to a person who *bonâ fide* applies for a search warrant, and is an answer to an action for maliciously causing the warrant to issue.

Counsel's
opinion no
good.

Counsel's opinion is no protection to the defendant who has instituted an unfounded and malicious prosecution (*p*).

4. Termination in
plaintiff's
favour.

(4.) That the proceedings *terminated in the plaintiff's favour.*

Articles of
peace.

It may happen, however, that the proceedings were in their nature incapable of terminating in the plaintiff's favour (*e.g.*, in the case of a malicious exhibition of articles of the peace), and in such a case the plaintiff is excused from the proof (*q*). But he will not be excused merely because there is no appeal from a particular summary conviction of justices (*r*). To hold otherwise would be, as Byles, J., said in the case referred to, "disturbing foundations."

No appeal.

If a person is convicted of an offence less serious than that with which he is charged, he may bring an action for malicious prosecution. In the recent case of *Boaler v. Holder* (*s*), the plaintiff was indicted under sect. 4 of the Newspaper Libel Act, though only committed for trial under sect. 5, and having brought an action for malicious prosecution, it was held that the conviction was no bar to the action. "To put a man on his trial," said Wills, J., "for a much graver offence than you have any chance of convicting him of, is a legal wrong."

Damages.

Further, in order to recover damages in an action for malicious prosecution, the plaintiff must show that he has suffered either in *person, reputation, or pocket* (*t*). Every expense properly incurred in defending himself from the false accusation may be recovered (*u*). General evidence of the plaintiff's bad character in mitigation of damages can only be given when he is trying to palm himself off on the jury as a highly respectable individual who ought to have

(*o*) (1886), 17 Q. B. D. 338; 55 L. J. M. C. 146. See also *Lea v. Charrington* (1889), 23 Q. B. D. 45, 272; 58 L. J. Q. B. 460; 61 L. T. 450.

(*p*) *Hewlett v. Cruchley* (1813), 5 Taunt. 277.

(*q*) *Steward v. Gromett* (1859), 7 C. B. N. S. 191.

(*r*) *Basébc v. Matthews* (1867), L. R. 2 C. P. 684; 36 L. J. M. C. 93.

(*s*) (1887), 51 J. P. 277.

(*t*) *Freeman v. Arkell* (1824), 2 B. & C. 494; 1 C. & P. 137; *Leith v. Pope* (1780), 2 W. Bl. 1327.

(*u*) *Foxall v. Barnett* (1853), 2 E. & B. 928; *Rowlands v. Samuel* (1847), 11 Q. B. 39.

extra compensation in consequence of the injury to his formerly untarnished reputation (*x*).

An action may be maintained for maliciously causing a man to be made bankrupt (*y*).

In the *Metropolitan Bank v. Pooley* (*z*), it was held that a bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy, and such an action may be summarily dismissed upon summons as frivolous and vexatious.

An action will lie for falsely and maliciously and without reasonable and probable cause presenting a petition under the Companies Acts, 1862—1867, to wind up a trading company, even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is from its very nature calculated to injure the credit of the company.

At the hearing of a plaint in a County Court to recover rent (*a*), the tenant's son was called as a witness, and swore that he had given up the key of the premises to the landlord before the rent accrued due. The landlord denied this and subsequently prosecuted the witness for perjury. He was acquitted and brought an action against the landlord for malicious prosecution. At the trial the plaintiff and defendant repeated their evidence as to the key, and the judge directed the jury alternatively that if they could not arrive at a conclusion as to which of the parties was speaking the truth, the plaintiff had not made out his case, and the defendant was entitled to a verdict; and that if they thought the plaintiff did give up the key, but the defendant owing to a defective memory had forgotten the occurrence and went on with the prosecution honestly believing that the plaintiff had sworn falsely and corruptly, then the jury would not be justified in saying that the defendant maliciously, and without reasonable and probable cause, prosecuted the plaintiff, and the defendant would be entitled to their verdict. It was decided that the direction of the judge was right (*b*).

The law with reference to cases of malicious prosecution has been recently illustrated by *Abrath v. North Eastern Railway Company*. In this case the following principle was laid down as governing actions for malicious prosecution. The burden of proof as to all the

Maliciously causing bankruptcy. Bankruptcy.

Maliciously presenting a petition.

Malicious prosecution reasonable and probable cause.

Onus of proof.

(*x*) *Rodriguez v. Tadmire* (1799), 4 E. & B. 493; 24 L. J. Q. B. 2 Esp. 721; *Downing v. Butcher* (1841), 2 M. & Rob. 374; *Cornwall v. Richardson* (1825), Ry. & M. 305.

(*y*) See *Johnson v. Emerson* (1871), L. R. 6 Ex. 329; 40 L. J. Ex. 201; *Farley v. Danks* (1855), 4 E. & B. 493; 24 L. J. Q. B. 244.

(*z*) (1885), 10 App. Ca. 210; 54 L. J. Q. B. 419.

(*a*) *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674; 52 L. J. Q. B. 488.

(*b*) *Hicks v. Faulkner*, *ubi sup.*

issues arising therein lies upon the plaintiff; and, although the plaintiff proves that he was innocent of the charge laid against him, and although the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, nevertheless the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff. The plaintiff, a surgeon, had attended one M., for bodily injuries alleged to have been sustained in a collision upon the defendants' railway. M. brought an action against the defendants, which was compromised by the defendants paying a large sum for damages and costs. Subsequently, the directors of the defendants' company, having received certain information, caused the statements of certain persons to be taken by a solicitor; these statements tended to show that the injuries of which M. complained were not caused at the collision, but were produced wilfully by the plaintiff, with the consent of M., for the purpose of defrauding the defendants. These statements were laid before counsel, who advised that there was good ground for prosecuting the plaintiff and M. for conspiracy. The defendants accordingly prosecuted the plaintiff, but he was acquitted. In an action for malicious prosecution, the judge directed the jury to find whether the defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; the jury having answered these questions in the affirmative, the judge entered the judgment for the defendants, and it was held by the House of Lords and the Court of Appeal, reversing the decision of the Divisional Court, that the judge had rightly entered the judgment for the defendants (c).

False imprisonment.

False imprisonment has been defined as "a trespass committed by one man against the person of another by unlawfully arresting him, and detaining him without any legal authority" (d). The imprisonment need not be by actual touch; any show of authority or force submitted to is sufficient, provided there is no reasonable means of escape open to him (e). But the restraint must be total; it is not imprisoning a man to prevent his going in a particular direction (f). If a prisoner is unlawfully detained after he has gained a right to be discharged, it becomes a fresh imprisonment,

(c) (1883), 11 Q. B. D. 440; 52 L. J. Q. B. 620. Reversing 11 Q. B. D. 79; 52 L. J. Q. B. 352; see also (1886), 11 App. Ca. 247; 55 L. J. Q. B. 457.

(d) Addison on Torts, 7th ed., p. 146; see also Henderson v.

Preston (1888), 21 Q. B. D. 362; 57 L. J. Q. B. 607.

(e) Grainger v. Hill (1838), 4 Bing. N. C. 212; Warner v. Riddiford (1858), 4 C. B. N. S. 180.

(f) Bird v. Jones (1845), 7 Q. B. 742; 15 L. J. Q. B. 82.

and entitles him to bring an action for false imprisonment (*g*). All persons aiding or furthering the unlawful confinement of another are responsible for the wrong, although they may have had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful (*h*).

It was decided in *Lock v. Ashton* (*i*) that where a man is given into custody on a mistaken charge, and then brought before a magistrate, who remands him, damages can be given against the prosecutor only for the trespass in arresting, not for the remand, which is the judicial act of the magistrate.

“What is reasonable cause of suspicion,” says Sir F. Pollock (*k*), “to justify arrest may be said, paradoxical as the statement looks, to be neither a question of law nor of fact, at any rate in the common sense of the terms. Not of fact, because it is for the judge and not for the jury (*l*); not of law, because “no definite rule can be laid down for the exercise of the judge’s discretion” (*m*). The anomalous character of the rule has been more than once pointed out and regretted by the highest judicial authority (*n*). The truth seems to be that the question was formerly held to be one of law, and has for some time been tending to become one of fact, but the change has never been formally recognized. The only thing which can be certainly affirmed in general terms about the meaning of “reasonable cause” in this connection is that, on the one hand, a belief honestly entertained is not of itself enough (*o*); on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. “It does not follow that, because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so” (*p*). It is obvious, also, that the existence or non-existence of reasonable cause must be judged,

Lock v. Ashton.

Reasonable cause of suspicion.

(*g*) *Withers v. Henley* (1615), Cro. Jac. 379.

(*h*) *Griffin v. Coleman* (1859), 4 H. & N. 265; 28 L. J. Ex. 137.

(*i*) (1848), 12 Q. B. 871; 18 L. J. Q. B. 76.

(*k*) Law of Torts, 4th ed., p. 207; and see *Howard v. Clarke* (1888), 20 Q. B. D. 558; 58 L. T. 401.

(*l*) *Hailes v. Marks* (1861), 7 H. & N. 56; 30 L. J. Ex. 389.

(*m*) *Lister v. Perryman*, *ubi sup.*, per Lords Chelmsford and Colonsay.

(*n*) Lord Campbell in *Broughton*

v. Jackson (1852), 18 Q. B. 378, 383; 21 L. J. Q. B. 266; Lords Hatherley, Westbury, and Colonsay in *Lister v. Perryman*, *ubi sup.*

(*o*) *Broughton v. Jackson*, *ubi sup.*; the defendant must show “facts which would create a reasonable suspicion in the mind of a reasonable man;” per Lord Campbell, C. J.

(*p*) Bramwell, B., *Perryman v. Lister* (1868), L. R. 3 Ex. at p. 202; approved by Lord Hatherley, S. C. nom. *Lister v. Perryman*, L. R. 4 H. L. at p. 533.

not by the event, but by the party's means of knowledge at the time."

As to the liability of a company for false imprisonment committed by their servant, the two recent cases of *Furlong v. South London Tramways Co.* (1884), 48 J. P. 329; 1 C. & E. 316; and *Charleston v. London Tramways Co.* (1888), 36 W. R. 367; 32 S. J. 557, should be compared.

No Contribution between Defendants in Tort.

[141.]

MERRYWEATHER *v.* NIXAN. (1799)

[8 T. R. 186.]

Merryweather and Nixan destroyed the machinery and injured the mill of a Yorkshireman named Starkey. The mill-owner was not prepared to submit tamely, and brought an action against the pair of them. The jury gave him 840*l.* as damages, and, instead of getting 420*l.* from each, he made Merryweather pay the whole 840*l.* Merryweather did not see why he should pay for Nixan's whistle as well as his own, and sued him for contribution, that is to say, for 420*l.* In fairness, of course, Nixan ought to have made no difficulty about paying it; but he steadfastly declined to do anything of the sort. The law upheld him in this refusal, for *ex turpi causâ non oritur actio*.

No contri-
bution.

There is no contribution between defendants in *tort*. In *contract* there is. If there are two sureties, and one of them is made to pay the whole debt, he can sue his brother surety for half of what he has paid (*q*). In such a case there is no *turpis causa*.

Exception
where
plaintiff
quite
innocent.

But the rule that one tortfeasor cannot sue another for contribution does not extend to the case where the former has acted quite innocently, and was simply obeying what he believed to be the lawful instructions of his employer. Such a person may claim not merely contribution, but an absolute indemnification. If A. orders

(*q*) See *Whitcher v. Hall*, *ante*, p. 307.

B. to drive cattle out of a field, and in obeying the order B. unwittingly commits a trespass, A. must indemnify him; but it would be different if the order given and obeyed were to assault C. without rhyme or reason, because B. must have known that A. had no business to tell him to do that(r).

Another exception is to be found in the case of defaulting trustees. Though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss occasioned by a breach of trust, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate. If all the trustees be equally guilty, then (unless the transaction was vitiated by not only constructive, but such actual fraud, that the Court will hold itself entirely aloof) an apportionment or contribution amongst the trustees may be compelled(s).

Defaulting trustees.

In delivering judgment in the recent case of *Palmer v. Wick Steam Shipping Co.*(t), a Scotch appeal, Lord Herschell made the following observations:—"The reasons to be found in Lord Kenyon's judgment" (in *Merryweather v. Nixan*) "so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson v. Jarvis*(u), Best, C.J., in delivering the judgment of the Court, referred to the case of *Philips v. Biggs*(x), which he said was never decided; "but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows: "From the inclination of the Court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to

Limitation of principle of leading case.

(r) *Pearson v. Skelton* (1836), 1 M. & W. 504; *Betts v. Gibbins* (1834), 2 Ad. & E. 57; 4 N. & M. 64; *Dixon v. Fawcus* (1861), 30 L. J. Q. B. 137; 3 El. & El. 537.

(s) *Lewin on Trusts*, 9th ed., p. 1040; and see *Ramskill v.*

Edwards (1885), 31 Ch. D. 100; 55 L. J. Ch. 81.

(t) [1894] A. C. 318; 71 L. T. 163.

(u) (1827), 4 Bing. 66; 12 Moore, 241.

(x) (1735), Hard. 164.

cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration."

Each joint tortfeasor liable for whole damage.

When several persons join in committing a tort, the person injured may select one particular tortfeasor as his victim, and make him pay all the damages. Thus, in an action against the huntsman of the Berkeley hounds for destroying fences and injuring crops, it was held that the defendant, being a co-trespasser, was liable for the whole of the damage done, not merely for what he had individually occasioned (y).

Effect of judgment against one joint tortfeasor.

Judgment recovered against one joint tortfeasor is a bar to an action against the others for the same cause, although the judgment remains unsatisfied (z).

A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other (a).

Ratification of tort.

A man for whose benefit a tort is committed may afterwards ratify and adopt it (b). "But to make a man a trespasser by relation from having ratified and adopted an act of trespass done in his name and for his benefit, it must be shown that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and to adopt the transaction, right or wrong" (c).

(y) *Hume v. Oldacre* (1816), 1 Stark. 351. And the same rule applies in the Admiralty Court, see *The Thomas Joliffe or The Avon*, [1891] P. 7; 63 L. T. 712.

(z) *King v. Hoare* (1844), 13 M. & W. 494; 14 L. J. Ex. 29; *Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547; 41 L. J. C. P. 190; *Buckland v. Johnson* (1854), 15 C. B. 145; 23 L. J. C. P. 204. But see *Martin v. Kennedy* (1800), 2 B. & P. 69, where it was held

that there may be several actions against different publishers of the same libel.

(a) *Duck v. Mayeu*, [1892] 2 Q. B. 511; 62 L. J. Q. B. 69.

(b) *Wilson v. Tummam* (1843), 6 M. & G. 236; 6 Scott, N. R. 894; and see *Hull v. Pickersgill* (1819), 1 B. & B. 282; 3 Moore, 612; *Buron v. Denman* (1848), 2 Ex. 167.

(c) *Add. Torts*, 7th ed., p. 96.

*Measure of Damages in Tort.*LUMLEY *v.* GYE. (1853)

[142.]

[2 E. & B. 216 ; 22 L. J. Q. B. 463.]

Mr. Lumley, the lessee and manager of the Queen's Theatre, engaged a lady to sing and perform on his boards for a period of three months. During the three months Mr. Gye, a rival manager, persuaded her to break her engagement, and leave Mr. Lumley; and it was for this interference that the present action was brought. It was held (in spite of the dissent of Coleridge, J., who thought that such an action could only be brought when the strict relationship of master and servant existed) that the action could be maintained, and damages recovered.

Lumley *v.* Gye was followed in the case of Bowen *v.* Hall (*d*), Lord Coleridge, C.J., however, with filial reverence, being dissentient. And the principle was re-affirmed in the recent case of Temperton *v.* Russell (No. 2) (*e*), and held applicable not only to cases of a person inducing others to break contracts already entered into, but also to the case of a person inducing others to refrain from entering into contracts with a third person.

Before the leading case was decided, it used to be thought that the damage in respect of which an action was brought must have been the *legal* consequence of the defendant's act (*f*). If, for instance, as the consequence of the defendant's slander, a mob had ducked the plaintiff in a horse-pond, such a consequence would have been an *illegal* and unnatural consequence of the slander, and could not be taken into account in estimating the compensation to be paid by the defendant to the plaintiff. Lumley *v.* Gye, however,

Vicars *v.*
Wilcocks.

(*d*) (1881), 6 Q. B. D. 333 ; 50 L. J. Q. B. 305. The *ratio decidendi* of these two cases "that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service to the detriment of the employer, being accepted, the

question of remoteness of damage scarcely arises.

(*e*) [1893] 1 Q. B. 715 ; 62 L. J. Q. B. 412.

(*f*) See Vicars *v.* Wilcocks (1806), 8 East, 1 ; Lynch *v.* Knight (1861), 9 H. L. Cas. 577 ; 8 Jur. N. S. 724.

alters this rule by allowing the wrongful act of a third party to form part of the damage where such wrongful act might be naturally contemplated as likely to arise from the defendant's conduct.

Not too remote.

The damage, however, must not be too remote. Where, for instance, the defendant libelled a public singer, in consequence of which she broke her engagement with the plaintiff, and would not sing, the plaintiff's injury was considered too remote. So it was, too, in another case, where the manager of a theatre brought an action against a person who horsewhipped one of his actors so soundly as to prevent him from performing. The cases of *Allsop v. Allsop* (where a married lady was made ill by the defendant's imputing incontinency to her), *Ward v. Weeks* (where somebody repeated the defendant's slanderous words), and *Hoey v. Felton* (*g*) (where a young man missed an engagement through the defendant's falsely imprisoning him), may also be referred to, all being cases in which the damage was held to be too remote, and not the direct and immediate result of the defendant's wrongful act. Loss of marriage, or the hospitality of friends, by reason of the defendant's slander, is such special damage as will support an action (*h*); but the mere risk of temporal loss is not sufficient (*i*).

Looser measure of damages in tort than in contract. Seduction.

The rules by which damages are assessed are much looser in tort than in contract. Juries may generally take into account all the surrounding circumstances, and give damages not so much to compensate the plaintiff as to punish the defendant. Thus, in the action of seduction, which in point of form purports to give a recompense for loss of services, the plaintiff would recover very different damages according to the seducer's social position and the manner in which he had accomplished his purpose. So, in an action for assault, the circumstances of time, place, and manner should be taken into account; it is a greater insult to be beaten upon the Royal Exchange than in a private room (*h*). Juries, in fact, have a very wide discretion, and there seems an increasing unwillingness of the Courts to interfere with their verdicts on the ground of excessive

Assault.

(*g*) *Allsop v. Allsop* (1861), 5 H. & N. 534; 29 L. J. Ex. 315; *Ward v. Weeks* (1830), 7 Bing. 211; 4 M. & P. 796; *Hoey v. Felton* (1861), 11 C. B. N. S. 142; 31 L. J. C. P. 105. And see *Cobb v. G. W. Ry. Co.*, [1894] A. C. 419; 63 L. J. Q. B. 629.

(*h*) *Davies v. Solomon* (1871), L. R. 7 Q. B. 112; 41 L. J. Q. B. 10.

(*i*) *Chamberlain v. Boyd* (1883), 11 Q. B. D. 407; 52 L. J. Q. B.

277.

(*k*) "*Atrox injuria æstimatur vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fustibus cæsus; vel ex loco, veluti si cui in theatro vel in foro vel in conspectu Prætoris injuria facta sit; vel ex persona, veluti si magistratus injuriam passus fuerit. . . . Nunquam et locus vulneris atrocem injuriam facit, veluti si in oculo [vel fundamento?] quis percussit.*" Just. Inst. Lib. 4, Tit. 4.

damages (*l*). In one case (*m*), where the action was for trespassing on the plaintiff's land, and the evidence showed that the defendant had made use of very offensive language, the jury returned a verdict for 500*l.* damages, and the Court refused to grant a new trial, saying, "Supposing a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done!'" Would that be a compensation?" Reference may be made to the recent case of *McArthur v. Cornwall* (*n*), which was an action for the recovery of land, and for damages for conversion of its produce. It was held, in the Privy Council, that the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management; and further, that, however wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendant beyond the loss sustained by the plaintiff.

In *Phillips v. The London and South Western Railway Company* (*o*), it was held that, in an action against a railway company for personal injuries to a passenger—in this case a doctor of some eminence—the jury might take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he had sustained through his inability to continue a lucrative professional practice.

Dr. Phillips's case.

Where it is evident that the jury have not given proper attention to all the elements of the plaintiff's claim, a new trial will be granted on the ground that the damages are insufficient (*p*).

Inadequate damages.

Before 1846, the surviving relatives of a person whose death had been caused by the negligent or wrongful act of another had no remedy against the wrongdoer, because *actio personalis moritur cum persona*. This hardship was removed by Lord Campbell's Act (9 & 10 Vict. c. 93); and now, when the bread-winner of a family is taken away under such circumstances, those who are likely to be the greatest sufferers may claim compensation (if the deceased

Lord Campbell's Act.

(*l*) See *Lambkin v. S. E. Ry. Co.* (1880), 5 App. Ca. 352; 28 W. R. 837; *Præd v. Graham* (1889), 24 Q. B. D. 53; 59 L. J. Q. B. 230; *Roberts v. Owen* (1889), 53 J. P. 502.

(*m*) *Merest v. Harvey* (1811), 5

Taunt. 442; 1 Marsh. 139.

(*n*) [1892] A. C. 75; 61 L. J. P. C. 1.

(*o*) (1879), 5 C. P. D. 280.

(*p*) *Phillips v. L. & S. W. Ry. Co.* (1879), 5 Q. B. D. 78; 49 L. J. Q. B. 233.

Wives,
husbands,
parents,
and
children.

Within 12
months.

Pecuniary
loss only to
be compen-
sated for.

Superior
education.

Funeral
expenses.

Only one
action.

Policy of

himself might have brought an action for personal injuries) from the person whose "wrongful act, neglect, or default" has caused the death. "Every such action," the Act provides, "shall be for the benefit of the wife, husband, parent (*q*), and child (*r*) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator." If, however, there is no executor or administrator, or if he does not commence the action within six months of the death, it may be brought by those really interested (*s*). But, in either case, it must be commenced within twelve months of the death. In estimating the damages under this Act, the jury must compensate for *pecuniary* loss alone; they cannot consider the *grief* of those who have lost a dear relative (*t*). But a *reasonable expectation of pecuniary benefit* from the continuance of the life may be taken into account. The jury, for instance, may give compensation for the loss of the benefit of a superior education which the children would have received if their father had lived (*u*). *Funeral expenses* are not recoverable (*x*). The amount given is to be divided among the beneficiaries in such shares as the jury shall direct (*y*). If the deceased in his lifetime recovered damages for the injury done him, his relatives cannot bring another action after he is dead (*z*). But if a man has been fraudulently induced to accept a sum of money and sign a release by deed—by being told, for instance, that his injuries are of a very trifling nature, and that, if he got worse, he could claim fresh damages—in that case he (or, if he died, his representatives) could maintain a subsequent action (*a*).

A policy of insurance which a person injured may have effected is

(*q*) See *Hetherington v. N. E. Ry. Co.* (1882), 9 Q. B. D. 160; 51 L. J. Q. B. 495.

(*r*) "Child" includes a child *en ventre sa mère*, but not an illegitimate child. But see *Walker v. G. N. Ry. Co.* (1891), 28 L. R. Ir. 69.

(*s*) 27 & 28 Vict. c. 95, s. 1.

(*t*) *Blake v. Midland Ry. Co.* (1852), 18 Q. B. 93; 21 L. J. Q. B. 233; and see *Grand Trunk Ry. of Canada v. Jennings* (1888), 13 App. Ca. 800; 58 L. J. P. C. 1; *Stimpson v. Wood* (1888), 57 L. J. Q. B. 484; 59 L. T. 218.

(*u*) *Pym v. G. N. Ry. Co.* (1863), 4 B. & S. 396; 31 L. J. Q. B. 377; but see *Harrison v. L. & N. W. Ry. Co.* (1885), 1 C. & E. 540.

(*x*) *Dalton v. S. E. Ry. Co.*

(1858), 27 L. J. C. P. 227; 4 C. B. N. S. 296.

(*y*) Sect. 2; and see *Springett v. Balls* (1866), 7 B. & S. 477.

(*z*) *Read v. G. E. Ry. Co.* (1868), L. R. 3 Q. B. 555; 18 L. T. 82. The statute gives to the personal representatives of a person killed by the wrongful act of another, not an independent cause of action, but a right of action where there was a subsisting cause of action at the time of the death; see 9 B. & S. 714; 37 L. J. Q. B. 278; and *Haigh v. Royal Mail Steam Packet Co.* (1883), 52 L. J. Q. B. 640; 49 L. T. 802.

(*a*) *Hirschfield v. L. B. & S. C. Ry. Co.* (1876), 2 Q. B. D. 1; 46 L. J. Q. B. 94.

not to be taken into account against him in settling the damages (*b*); insurance but if the insurance money covers the whole consequences of the injury, he is a trustee for the insurers of the money he receives from the defendants (*c*).

In *Bradshaw v. The Lancashire and Yorkshire Railway Company* (*d*), it was held that where a passenger on a railway was injured, and after an interval died in consequence, his executrix might recover *in an action for breach of contract* against the defendants the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. But if the action were *in tort* (as where the deceased was run over at a level crossing) such a claim could not be supported (*e*).

The 25th section of the Regulation of Railways Act, 1868 (*f*), provides for the reference to arbitration of any claim for damages in respect of injuries or death, if the parties are agreed. On joint application in writing to the Board of Trade, an arbitrator will be appointed, with power to determine the compensation, if any, to be paid.

Damage to personal estate.

Arbitration.

(*b*) *Bradburn v. G. W. Ry. Co.* (1874), L. R. 10 Ex. 1; 44 L. J. Ex. 9.

(*c*) See *Randal v. Cockran* (1748), 1 Ves. sen. 97; *Simpson v. Thompson* (1877), 3 App. Ca. 279; 38 L. T. 1; *Clark v. Blything* (1823), 2 B. & C. 254; 3 D. & R. 489; and see *Bulmer v. Bulmer* (1883), 25 Ch. D. 409; 53 L. J. Ch. 402.

(*d*) (1875), L. R. 10 C. P. 189; 44 L. J. C. P. 148; and see *Leggott v. G. N. Ry. Co.* (1876), 1 Q. B. D. 599; 45 L. J. Q. B. 557; *Potter v. Met. Dist. Ry. Co.* (1874), 30 L. T. 765.

(*e*) *Pulling v. G. E. Ry. Co.* (1882), 9 Q. B. D. 110; 51 L. J. Q. B. 453.

(*f*) 31 & 32 Vict. c. 119.

MISCELLANEOUS CASES.

*Evidence : Hearsay.*DOE *d.* DIDSBURY *v.* THOMAS. (1811)

[143.]

[14 EAST, 323.]

In this case Ann Didsbury brought an action of ejectment for the Meadow Farm at Tideswell in Derbyshire. She claimed it under the will of a Mr. Samuel White, who had died some time before. The will was dated November 26th, 1754, and the chief obstacle to the plaintiff's success was to prove that the lands were the testator's at that time. In support of her case she called a witness who swore that the farm in question, together with another farm called Foxlow's Croft, were reputed to have been Sir John Statham's, and to have been purchased at the same time with it by Samuel White from Sir John. That of course alone did not fix any particular date. But to supplement this evidence, and make it serve the plaintiff's cause, a deed was produced dated March 25th, 1752, whereby in consideration of natural love and affection, Samuel White bargained and enfeoffed his son Edward of Foxlow's Croft, "all which said farm, &c., have been lately purchased *amongst other lands and hereditaments* by the said Samuel White of and from Sir John Statham."

It was clearly proved that Richard, the testator's eldest son, had taken possession of and occupied the Meadow Farm at the same time that his younger brother Edward had begun to occupy Foxlow's Croft; and also that the person immediately preceding Richard in the occupation of the Meadow Farm was tenant to Sir John: and the

plaintiff's counsel argued that under the circumstances the evidence of reputation could be received. It was held, however, that the evidence could not be received, as *reputation is not admissible in questions of private right.*

The reasons generally given why what another man said is not evidence are that he was not on his oath when he said it, and that he cannot be cross-examined. But the real principle of the exclusion would seem to be, that "all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected" (a).

The chief exceptions to the rule that "hearsay is not evidence" are the following:—

1. Hearsay is admissible respecting matters of *public and general interest*, such as the boundaries of counties or parishes, claims of highway, &c. The reason for the exception in this case is that the origin of such rights is generally obscure and incapable of better proof, that people living in the district are naturally interested in local matters and likely to know about them, and that reputation cannot well exist without the concurrence of many persons who are strangers to one another, and yet equally interested. Such declarations, however, to be evidence must have been made *ante litem motam*, that is, before any dispute on the subject has arisen; although they do not become inadmissible because they were made with a view of preventing the dispute from arising (b). They must also be confined to *general matters*, and not touch the *particular facts* from which the general right or interest is to be inferred. "Thus, if the question be whether a road be public or private, declarations by old persons, since dead, that they *have seen repairs done upon it* will not be admissible; neither can evidence be received that a deceased person *planted a tree* near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy (c). So, proof of old persons having been heard to say that a *stone was erected*, or *boys whipped*, or *cakes distributed*, at a particular place, will not be admissible evidence of boundary; and where the question was whether a turnpike stood within the limits of a town, though evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people, since dead, that

Ante litem motam.

Particular facts not admissible.

(a) Best on Evidence, p. 629.

(b) Berkeley Peerage case (1861), 8 H. L. Ca. 21.

(c) R. v. Bliss (1837), 7 A. & E. 550; 2 N. & P. 461.

formerly houses stood where none any longer remained were rejected, on the ground that these statements were evidence of a particular fact" (*d*).

As the leading case shows, evidence of this kind is not admissible on questions of *private* right. In a case in which the question was who had the right to appoint to the head-mastership of Skipton-in-Craven grammar school, an old man of eighty years was produced to prove the tradition he had received from his ancestors as to the mode of election in their time, but the evidence was rejected on the ground that the question in dispute was one of private right (*e*). Similar evidence was rejected in a case (*f*) where the question was whether the sheriff of a county (Cheshire) or the corporation of the county town were charged with the duty of executing criminals. An *ex officio* information was filed by the Attorney-General against the High Sheriff for not having executed some murderers; and the chief witness for the Crown was the Clerk of Assize. In cross-examination he was asked whether he had not heard it reported amongst old persons in Chester that the corporation were bound to execute. But the clerk's evidence on this point was not allowed to be given. "This," said Littledale, J., "is a private question whether the sheriffs of the county or the city are to perform a duty. The citizens of Chester may, perhaps, have a particular interest; and how do we know that there may not be a grant of felons' goods to them? However this matter may be, the question is immaterial to the public."

Questions of private right.

It seems to be a doubtful point whether evidence of reputation can be given to prove or disprove a private prescriptive right or liability in which the public is interested. Such evidence, however, was admitted in a case in which the inhabitants of a county, being indicted for non-repair of a public bridge, pleaded that certain specified persons were bound *ratione tenure* to repair it (*g*).

It is, too, a well established rule of law that public documents are admissible for certain purposes, where they have been made after public inquiry by a public officer. The word "public" is not to be taken in the sense of meaning the whole world. "I think," says Lord Blackburn (*h*), "an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned,

Public documents

(*d*) Taylor on Evidence, vol. i., p. 526.

(*e*) Withnell v. Gartham (1795), 1 Esp. 322; 6 T. R. 388.

(*f*) R. v. Autrobus (1835), 2 A. & E. 788; 6 C. & P. 784.

(*g*) R. v. Bedfordshire (1855), 4 E. & B. 535; 24 L. J. Q. B. 81.

(*h*) Sturka v. Freccia (1880), 5 App. Ca. at p. 643; 50 L. J. Ch. 86.

would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire." And it has recently been held (*i*) in an action for trespass to a several fishery, that entries of the names of tenants in parish rate-books were admissible in proof of ownership of the fishery by the plaintiff's predecessors in title. But, on the other hand, it was held in the recent case of *Reg. v. Berger* (*k*) that a map attached to an old inclosure award showing a highway existent at the date of the award, was not admissible as evidence of reputation to prove the boundaries of the highway at that date against a person whose property adjoined the highway, but over which the Inclosure Commissioners had no jurisdiction.

Matters
ecclesiastical.

The Ecclesiastical Courts may consult ancient authors, historical and theological works, pictures, engravings, and other ancient documents, with respect to the practice of the primitive church, the ritual of the Eastern and Western Churches, the position of the Lord's table, the position of the celebrant at the table, and like questions, which are beyond the reach of living memory (*l*).

Pedigree.

2. Hearsay is admissible in matters of *pedigree*, where the pedigree to which the declarations relate is directly in issue.

"The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

"The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant" (*m*).

Such declarations, together with inscriptions on tombstones, entries in family bibles, and the like, are admissible on the principle that they are the natural effusions of a person who must know the truth, and has no motive for misrepresenting it. As in the last case, the declarations must have been made *ante litem motam*; and it is now settled that the persons making them must have been, not merely servants, friends, or neighbours, but members of the family (*n*).

(*i*) *Smith v. Andrews*, [1891] 2 Ch. 678; 65 L. T. 175.

(*k*) [1894] 1 Q. B. 823; 63 L. J. Q. B. 529.

(*l*) *Read v. Lincoln (Bishop)*, [1892] A. C. 644; 62 L. J. P. C. 1.

(*m*) *Stephen on Evidence*, 5th ed. p. 43; and see *Haines v. Guthrie* (1884), 13 Q. B. D. 818; 53 L. J. Q. B. 521; *In re Thompson* (1887), 12 P. D. 100; 56 L. J. P. 46.

(*n*) *Shrewsbury Peerage case* (1858), 7 H. L. Ca. 1.

And such statements by deceased members of the family may be proved, not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them (o).

3. Hearsay is admissible in favour of ancient documents when tendered in support of *ancient possession*. Ancient documents.

“The proof of ancient possession,” said Willes, J., in a disputed fishery case (p), “is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. In some cases written statements of title are admitted even when they amount to mere assertion, as in the case of a right affecting the public generally; but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting upon the face of them to show exercise of ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or licences ought to be of no avail. It may be a question whether the absence of proof of enjoyment consistent with such documents goes to the *admissibility* or only to the *weight* of the evidence; probably the *latter*.”

Sir James Fitzjames Stephen in his “Digest” does not place this class of evidence as an exception to the rule excluding hearsay, but gives the effect of it separately, thus: “Where the existence of any right of property, or of any right over property, is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence, or renders its existence improbable, is relevant.

“*Illustrations.*—(a.) The question is whether A. has a right of

(o) Per Blackburn, L. J., in *Malcolmson v. O'Dea* (1863),
Sturla v. Freccia, *supra*, at p. 611. 10 H. L. Ca. 593; 9 L. T. 93.

fishery in a river. An ancient *inquisitio post mortem*, finding the existence of a right of fishery in A.'s ancestors, licences to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant (*g*).

“(b.) The question is whether A. owns land. The fact that A.'s ancestors granted leases of it is deemed to be relevant” (*r*).

Documents more than thirty years old are presumed to be in the handwriting of the persons who purport to have written them, provided they are produced from such custody as the judge considers proper.

Entries
against
interest.

4. Hearsay is admissible in favour of *declarations made by persons since deceased against their interest*.

On this subject, see *Higham v. Ridgway*, *post*, p. 506.

Entries in
course of
business.

5. Also in favour of declarations made by such persons in the *ordinary course of their business*.

On this subject, see *Price v. Torrington*, *post*, p. 505.

Dying
declara-
tions.

6. Hearsay is admissible sometimes in favour of *dying declarations*.

This, however, is confined to criminal law. And even then a dying declaration is only admitted when the death of the person making the declaration is the subject of the charge, and the circumstances of the death the subject of the dying declaration. This may sound a hibernianism, but a little thought will convince the reader that it is not. The declaration, too, must be made when the declarant has no hope of recovery and is in actual danger of death.

Character.

7. In criminal cases, evidence is admissible to show that the accused bears a good character.

Counsel defending prisoners sometimes ask a witness to character “*Do you believe the prisoner to be an honest man?*” Such a question is, however, irregular: it is not the belief of the witness that is admissible in evidence, but the general reputation borne by the prisoner amongst his neighbours.

Sheen v.
Bump-
stead.

So, too, in a civil action, evidence of character may become relevant. Thus, in one case (*s*), a Yarmouth grocer named Watson wanted some cheese; so he wrote to a cheese-factor at Leicester asking for some, and said another Yarmouth grocer named Bumpstead would answer for him. On receiving this application the cheese-factor wrote to Bumpstead, and asked him about Watson. Bumpstead replied that to the best of his knowledge Watson was a trustworthy person. Watson turned out an unsatisfactory cus-

(*g*) *Rogers v. Allen* (1808), 1 (1842), 3 Q. B. 622.
Camp. 309.

(*s*) *Sheen v. Bumpstead* (1863), 2
(*r*) *Doe d. Egremont v. Pulman* H. & C. 193; 10 Jur. N. S. 242.

tomers, and the cheese-factor went to law with Bumpstead for a fraudulent misrepresentation. In defence, Bumpstead called a witness who was asked by the defendant's counsel, "Was Watson on the 24th of October, 1860, trustworthy to your belief?" The question was held admissible, as tending to show that Bumpstead made the representation in good faith. Bramwell, B., however, dissented on the ground that the question was one as to the witness's *belief*, and not as to Watson's reputation: and see the recent case of *Scott v. Sampson* (1882), 8 Q. B. D. 491; 51 L. J. Q. B. 380.

8. Spoken words may, too, sometimes become admissible as forming part of the transaction, or, as it is technically called, as part of the *res gestæ*.

Exclamations at the time of an assault, for instance, can be given in a subsequent action. In a rape prosecution, one of the most important witnesses is usually the woman to whom the girl complained. This woman can be asked, "Did she make a complaint to you?" but counsel is not generally allowed to go further and ask, "What did she complain of?" as what she said then was not part of the *res gestæ*.

Evidence: Declarations by Persons since deceased.

PRICE v. TORRINGTON. (1703)

[144.]

[1 SALK. 285.]

This was an action by a brewer against a noble lord for beer which his household had drunk. The practice at the plaintiff's brewery was for the draymen who had taken out beer during the day to sign their names in a book kept for the purpose before they went home. The particular drayman who had taken Lord Torrington his beer was dead, but he had duly made his entry, and the question was whether it was admissible evidence for the plaintiff. It was held that it was, on the ground that it was an entry made *by a disinterested person in the ordinary course of his business*.

[145.]

HIGHAM *v.* RIDGWAY. (1808)

[10 EAST, 109.]

When was William Fowden born? On the answer to this question depended large estates in the county of Chester. Elizabeth Higham laid claim to them by virtue of a certain remainder; but those who contested her right said that her remainder had been barred by a recovery suffered on April 16th, 1789, by one William Fowden, since deceased. Mrs. Higham's answer to this was, that on the day named William Fowden had not yet come of age, and was therefore incapable of suffering recoveries and barring remainders. So it was that it was strenuously disputed on which side of April 16th, 1768, the late Mr. Fowden had been born. Was he or was he not of age on April 16th, 1789? It was of course the object of Mrs. Higham to make out that he was born later than April 16th; and the most important piece of evidence she adduced in support of that view was an entry in the diary of a man-midwife who, like Fowden, had long since joined the majority. In that diary, under the head of April 22nd, 1768, there was this important entry:—

“W. Fowden, jun.'s wife,

“Filius circa hor. 3 post merid. natus H.

“W. Fowden, jun.,

“Ap. 22, filius natus

“Wife, £1 6s. 1d.

“Paid, 25 Oct. 1768.”

This entry was admitted in evidence on the ground that it was a declaration *against interest*, the law shrewdly suspecting that no one would put himself down as paid when he had not been.

These two cases establish that statements made by deceased persons are admissible in evidence when they were made in the usual course and routine of business, or when they were made

against the interest of the declarant. In order that a statement may be admissible as falling within the first of these two classes, it must satisfy four conditions (*t*): “(1.) That it is an entry of a transaction effected or done by the person who makes the entry, (2.) that it is an entry made at the time of such transaction or near to it, (3.) that it is made in the usual course and routine of business by that person, and (4.) that he was at that time a person who had no interest to mis-state what had occurred.” Moreover, the reader must carefully notice that when the entry is admissible as having been made in the ordinary course of the deceased person’s business, *only so much of the entry as it was the man’s duty to make is admissible*; any other fact which happens to be stated in the entry, no matter how naturally it occurs, is excluded. Thus, in one well-known case (*u*) it became necessary to show that a person had been arrested in South Molton Street. The officer who arrested him had died since the arrest, but it was proposed to put in evidence a certificate made by him at the time of the arrest, which specified, with other circumstances, *the place* of the arrest. It was held, however, that although the certificate would have been admissible to establish the fact of the arrest, it could not be accepted in evidence to show where the arrest had taken place, inasmuch as the duty of the officer was to annex to the writ a certificate stating merely the fact of the arrest, and not the particulars attending it.

Four conditions.

Extra information.

Place of arrest.

A different rule, however, prevails as to entries admissible by reason of being contrary to interest. Not only is the entry allowed to prove the particular fact which is against the writer’s interest (*e. g.*, that he has been paid), but any other facts which may happen to be stated in the entry. It will be seen that, if this had not been so, Mrs. Higham would not have been able to prove by the entry produced the date of Mr. Fowden’s birth, for the only part of that entry which was contrary to interest was the acknowledgment of payment, and that fact, however interesting, would scarcely have aided the good woman’s contention.

The word interest in the expression “contrary to interest” refers exclusively to *pecuniary* or *proprietary* interest. An entry (*x*), for instance, by a deceased clergyman to the effect that he had performed a certain marriage was not allowed to be given in evidence to prove the marriage merely because the marriage had been performed under circumstances which would have rendered the officiating clergyman liable to a criminal prosecution. Provided,

Meaning of “interest.”

(*t*) Per Brett, L. J., in *Polini v.* 531.

Gray (1879), 12 Ch. D. 438; 49 L. J. Ch. at p. 49.

(*u*) *Chambers v. Bernasconi* (1834), 1 C. M. & R. 347; 4 Tyr.

(*x*) *Sussex Peerage case* (1844), 11 C. & F. 85, at p. 108; 8 Jur. 793.

however, that a pecuniary interest in fact exists, the Courts are not critical in weighing the amount of it.

Massey v.
Allen.

In an action (*y*) for indemnity in respect of certain shares purchased in the name of the plaintiff as trustee, the plaintiff sought to prove that the shares were purchased for one of the defendants by his stockbroker. To establish this the plaintiff tendered in evidence an entry made by the stockbroker, who had died before the trial, in his day-book. The entry was, however, ruled to be inadmissible, because it might, according to the turn of the market, have proved *available for the advantage of the stockbroker* as well as against him. Nor was the entry allowed to be received on the ground that it had been made in the ordinary course of business, and for this reason: the entry was not made by the broker in *the discharge of any duty by him*. The day-book in which the entry was made was kept by the broker simply for his own convenience.

It appears to be a moot point whether a declaration is admissible as contrary to interest when it is the *only evidence of the charge* of which it shows the subsequent payment (*z*).

Admissions
by persons
in posses-
sion of
land.

The statements of persons in possession of land explanatory of the character of their possession are, if made in disparagement of the declarant's title, good evidence. But the declarations of owners who have a limited interest in the property will not avail against reversioners or remaindermen (*a*).

Verbal
declara-
tions.

The reader will understand that not only are the *written entries* of a deceased person admissible, but also his *verbal declarations*, when made under circumstances which satisfy the requisite conditions. As the late Lord Justice Thesiger observed (*b*), "The principle upon which written entries of a deceased person are admissible in evidence is this, that, in the interests of justice, where a person who might have proved important material facts in an action is dead, his statements before death—I pass over for the moment whether in writing or verbal—relating to that fact are admissible, provided there is a sufficient guarantee that the statements made by him were true. It is considered, and properly considered, that where the statements made by a person were statements against his interest, those statements, at all events in the general run of cases, would probably be true. Now, is there any reason in principle why there should be a distinction made between the written entries of such a deceased person under such

(*y*) *Massey v. Allen* (1879), 13 Ch. D. 558; 49 L. J. Ch. 76.

(*z*) *Doe d. Gallop v. Vowles* (1833), 1 Mo. & Rob. 261; *R. v. Heyford*, 2 S. L. C.

(*a*) *R. v. Exeter* (1869), L. R. 4

Q. B. 341; 38 L. J. M. C. 126; *Crease v. Barrett* (1835), 1 C. M. & R. 917; 5 Tyr. 458.

(*b*) *Bewley v. Atkinson* (1879), 13 Ch. D. 283; 49 L. J. Ch. at p. 160.

circumstances and his verbal declarations? I can see no reason. When the statements are merely verbal, there is every reason for watching more carefully the evidence by which those declarations are proved; but provided you are satisfied the declarations were in fact made, there is no reason whatever why there should be any distinction between the admissibility of the verbal declarations and the admissibility of the written entries."

It was the practice that the proceedings of the Provost and Fellows of King's College, Cambridge, should be entered in a book, and that the entries should be signed by the registrar of the college, who was a notary public, and who signed the entries in that character. One or two of the entries were not so signed. It was decided that an unsigned entry was not admissible in evidence, notwithstanding that it was proved to be in the handwriting of the person who usually made the entries at the time when it was made (*c*).

F. was tenant to C. with a promise of a lease for twenty-one years from September, 1851, to September, 1872, at the rent of 84*l.* 16*s.* Afterwards C. entered F.'s name in his rent book as the tenant of 128 acres at 16*s.* an acre, at yearly rent of 102*l.* 8*s.*, less 4*l.* for county cess 98*l.* 8*s.* "Tenure thirty-one years from September, 1872, at rent of 16*s.* per acre, allowed 4*l.* for county cess." The entry was in C.'s handwriting. Held that it was admissible in evidence as a statement against the proprietary and pecuniary interest of C. (*d*).

Neither proof of an entry made by a deceased person in the ordinary course of business in a postage book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of posting (*e*). And consult the recent cases of *Newbould v. Smith* (1886), 33 Ch. Div. 127; 55 L. J. Ch. 788; affirmed on different grounds, 14 App. Ca. 423; 61 L. T. 814; *Ex parte Edwards, In re Tollemache* (1884), 14 Q. B. D. 415; *Ex parte Revell, In re Tollemache* (1884), 13 Q. B. D. 720; 54 L. J. Q. B. 89; *In re Turner, Glenister v. Harding* (1885), 29 Ch. D. 985; 53 L. T. 528. The *Lovat Peerage Case* (1885), 10 App. Ca. 763.

(*c*) *Fox v. Bearblock* (1881), 17 Ch. D. 429; 50 L. J. Ch. 487; and see *Dysart Peerage case* (1881), 6 App. Ca. 489.

(*d*) *Conner v. Fitzgerald* (1883),

11 L. R. Ir. 106.

(*e*) *Rowlands v. DeVeechi* (1882), 1 C. & E. 10; and see *Dodds v. Tuke* (1881), 25 Ch. D. 617; 53 L. J. Ch. 598.

Highways.

[146.]

DOVASTON v. PAYNE. (1795)

[2 H. BL. 527.]

This was an action for wrongfully taking and impounding cattle, and the legal gentleman who drew the pleadings for the plaintiff ruined his case by saying that the cattle were “*in*” the highway, when he ought to have been careful to say that they were “*passing along*” it.

What is a highway?

A highway may be defined as *a passage which all the Queen's subjects have a right to use*. Of highways there are several kinds; such as footpaths, turnpikes, streets, and public rivers. So, too, a *cul de sac* may be a highway just as much as a through thoroughfare (*f*).

Easement.

The amount of interest that the public have in a highway is well put by Heath, J., in *Dovaston v. Payne*:—“The property is in the owner of the soil, subject to an easement for the benefit of the public.” An easement, nothing more. The public have a right to use it for all the purposes of a highway; but, subject to the public easement, the right of property remains in the owner of the soil.

Pheasant shooting in the highway.

Thus, in *R. v. Pratt* (*g*), the appellant, whilst on a highway, carrying a gun, had sent a dog into a covert on one side of the highway. Immediately afterwards a pheasant flew across the highway, at which he fired. Under these circumstances, the appellant was held rightly convicted of trespass on the highway under the Day Poaching Act. Lord Campbell observed: “No doubt the appellant was a trespasser when he went upon the highway as he did for the purpose of searching for game, and for that purpose only, and I think he must be considered as being in search of game *there*.”

Presumption of ownership.

In the absence of any express evidence to the contrary, the ordinary presumption is that the landowners on either side of the highway are entitled to the soil of the road which bounds their land *usque ad medium filum vice*. This presumption is doubtless founded

(*f*) *Vernon v. Vestry of St. James, Westminster* (1880), 16 Ch. D. 449; 50 L. J. Ch. 81. See also *Bourke v. Davis* (1889), 44 Ch. D. 110; 62 L. T. 31.

(*g*) (1855), 4 El. & B. 860; 24 L. J. M. C. 113. This case was recently approved by the Court of Appeal in *Harrison v. Rutland* (Duke), [1893] 1 Q. B. 142; 62 L. J. Q. B. 117.

on the assumption "that in making a road for public convenience, the owners of the adjoining land have sacrificed a portion of their property in order to devote it to public purposes" (*h*). And where the presumption arises, as will readily be supposed, the rule is that the sale of an estate bounded by roads operates to pass to the purchaser the property in the soil of those roads *usque ad medium filum vie*. It must not, however, be forgotten that this presumption is capable of being easily rebutted, as, for example, by showing that the road was originally set out under an Inclosure Act; and, indeed, in all districts in which the Public Health Act, 1875, is in force, the soil of the highway is vested in the local authority, but only to such a depth as is usually required for the ordinary work which the authority would need to execute in and upon the highway (*i*).

It may, too, be added that the presumption as to the ownership of the soil of waste land adjoining a road is that it belongs to the owner of the adjoining enclosed land, and not to the lord of the manor (*k*).

The dedication of a highway to the public is a question of *intention*, such intention, however, being capable of being inferred from long user. "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it, after being allowed to use it so long without any interruption" (*l*). But the user by the public is merely evidence of the intention to dedicate, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (*m*). Of course, if the act

Dedication
of high-
way.

(*h*) Per Cockburn, C. J., in *Leigh v. Jack* (1879), 5 Ex. D. 264; 49 L. J. Ex. 222; and see *Merrett v. Bridges* (1883), 47 J. P. 775; *R. v. Dover* (1884), 32 W. R. 876; 49 J. P. 86; *R. v. Local Government Board* (1885), 15 Q. B. D. 70; 54 L. J. M. C. 104; *Marshall v. Taylor*, [1895] 1 Ch. 641; 61 L. J. Ch. 416.

(*i*) *Coverdale v. Charlton* (1878), 4 Q. B. D. 104; 48 L. J. Q. B. 128.

(*k*) *Doe d. Pring v. Pearsley* (1827), 7 B. & C. 204; 9 D. & R. 908.

(*l*) Per Ellenborough, C. J., in *King v. Lloyd* (1808), 1 Camp. 260. But see *Wood v. Veal* (1822), 5 B. & Ald. 454; *Hall v. Corporation of Bootle* (1881), 44 L. T. 873; 29 W. R. 862. See also *Grand Junction Canal Co. v. Petty* (1888), 21 Q. B. D. 273; 57 L. J. Q. B. 572; *Eyre v. New Forest Highway Board* (1892), 56 J. P. 517; *Robinson v. Cowpen Local Board* (1893), 63 L. J. Q. B. 235; 9 R. 858.

(*m*) Per Parke, B., in *Poole v. Huskinson* (1813), 11 M. & W. 827.

of dedication be unequivocal, the dedication may take place immediately.

Limited dedication.

It is, moreover, worthy of remark that the dedication of the highway may be limited as to purpose, *e.g.*, it may be for all purposes except that of carrying coal (*u*), or as in the case of a bridge which is to be used only when the river is so swollen that persons attempting to ford it would be drowned, or of a footway which is liable to be ploughed up occasionally. But the dedication must be general to the public, and not merely to a limited part of the public, as a particular parish (*v*); such a partial dedication is simply void, and will not operate in law as a dedication to the whole public.

Take it as you find it.

It is to be observed, also, that a highway may be dedicated with an obstruction on it, so that the dedicator would not be responsible for an accident happening by reason thereof (*w*).

Can a lessee dedicate?

In a recent case (*y*) the point arose (though it became unnecessary to decide it) whether a lessee can dedicate to the public. Probably, however, it may be said that he has no such power, at any rate except as against himself and his assignees. But it is to be remembered that long user, as of right, and openly, is evidence from which assent on the part of the owner, whoever he may be, is *prima facie* to be inferred. The burden lies upon the person who seeks to deny the inference from such user, to show negatively that the state of the title was such that the dedication was impossible, and that no one capable of dedicating existed (*z*).

Mending the roads.

The obligation of repairing a highway generally falls on the occupiers of land in the parish through which the highway runs; but it is not within the scope of this work to describe the machinery provided for the execution of these repairs by the various highway authorities, *e.g.*, surveyors of highways, highway boards, and county and parish councils (*s*). It may, however, be mentioned that, when

(*u*) *Stafford v. Coyney* (1827), 7 B. & C. 257.

(*v*) *Hildreth v. Adamson* (1860), 8 C. B. N. S. 587; 30 L. J. M. C. 204.

(*w*) *Fisher v. Prowse* (1862), 2 B. & S. 770; 31 L. J. Q. B. 212.

(*x*) *Att.-Gen. v. Biphosphated Guano Co.* (1879), 11 Ch. D. 327; 49 L. J. Ch. 68.

(*y*) See *Powers v. Bathurst* (1880), 49 L. J. Ch. 294; 42 L. T. 123.

(*z*) Of the immense number of cases as to the repair of highways, the following are the most recent: *Tunbridge Highway Board v. Sevenoaks Highway Board* (1885),

33 W. R. 306; 49 J. P. 340; *Laphorn v. Harvey* (1885), 49 J. P. 709; *Lancaster Justices v. Newton Improvement Commissioners* (1886), 11 App. Ca. 416; 56 L. J. M. C. 17; *Leek Improvement Commissioners v. Staffordshire Justices* (1888), 20 Q. B. D. 794; 57 L. J. M. C. 102; *Sheppey Union v. Elmley Overseers* (1886), 17 Q. B. D. 364; 55 L. J. M. C. 176; *In re Warminster Local Board* (1890), 25 Q. B. D. 450; 59 L. J. Q. B. 434; *Reg. v. Barker* (1890), 25 Q. B. D. 450; 59 L. J. M. C. 105.

a road was dedicated to the public, at common law the consequence followed that it became repairable by the inhabitants of the parish or district. But now, under the provisions of the General Highway Act, 1835, the inhabitants cannot be compelled to repair a road so dedicated as a highway unless certain things are done—amongst others, unless the road be made in a substantial manner and to the satisfaction of the highway authorities (*t*).

Sometimes, too, the burden of repairing falls on a private person by prescription, or *ratione tenuræ*, i.e., by reason of the tenure of lands. But to constitute such liability it must have existed from time immemorial. So, also, a man may be bound to repair *ratione clausuræ*, i.e., as the occupier of lands adjoining the highway which he has enclosed, and over which the public had a right to go in case the road became incommodious or impassable.

“Once a highway, always a highway,” is a familiar common law maxim; but power is now given to justices of the peace, under certain circumstances, to divert or extinguish highways; and it has been held in a recent case (*u*) that when access to a highway has become impossible, in consequence of the ways leading to it having been legally stopped up, it ceases to be a highway. “The great difficulty here,” said Denman, J., in the case referred to, “seems to arise from the familiar dictum, ‘once a highway, always a highway,’ and from the necessity of now, for the first time, placing a limitation on it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has not been stopped by a statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen’s subjects can have access, loses its character of a highway.”

In *Kent v. Worthing Local Board of Health* it was decided that it was the duty of the defendants to make such arrangements that works under their care should not become a nuisance to the highway, and the plaintiff recovered damages from the defendants for injuries to his horse caused by a valve cover in the road being exposed by the ordinary wear of the traffic, and causing the horse to fall (*x*). But this case has now been overruled (*y*), and it is now

Private person having to do it.

Stopping up highways.

Duties of local board.

Cowley v. New-

(*t*) See per Blackburn, J., in *R. v. Dukinfield* (1863), 4 B. & S. 158; 32 L. J. M. C. 235. And see *Amesbury Guardians v. The Justices of Wilts* (1883), 10 Q. B. D. 480; 52 L. J. M. C. 64, as to the liability for the expense of removing snow.

(*u*) *Bailey v. Jamieson* (1876), 1 C. P. D. 329; 34 L. T. 62; and see *United Land Co. v. Tottenham Board of Health* (1881), 13 Q. B. D.

610; 53 L. J. M. C. 136. As to the notices necessary to be given, see *Reg. v. Surrey JJ.*, [1892] 1 Q. B. 867; 61 L. J. M. C. 153.

(*x*) (1882), 10 Q. B. D. 118; 52 L. J. Q. B. 77; and see *White v. Hindley Local Board* (1875), L. R. 10 Q. B. 219; 41 L. J. Q. B. 111; *Blackmore v. Vestry of Mile End Old Town* (1882), 9 Q. B. D. 451; 51 L. J. Q. B. 496.

(*y*) See *Cowley v. New market*

market
Local
Board.

clearly established that a local board, being the highway authority of the district, are *not liable* for damages caused to a person in consequence of the highway being out of repair, when such non-repair is a *mere nonfeasance*.

Dedica-
tion.

A court which was not a thoroughfare had, for seventy or eighty years, been, at all hours, open to the public, and had been paved, lighted, and cleansed by the parish vestry, and the owners of the soil were not shown to have, during that time, exercised any right of ownership over the soil of the court. It was decided by Vice-Chancellor Malins that the court had been dedicated to the public so as to bring it under the vestry according to the Local Management Act of the Metropolis (z).

Indict-
ment for
obstruc-
tion.

Upon the trial of an indictment for obstructing a highway, the defendant was acquitted. It was decided that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted (a). As to indictments for non-repair of highways, reference should be made to the recent cases of *Reg. v. Lordsmere Inhabitants* (1886), 54 L. T. 766; 16 Cox, C. C. 65; *Reg. v. Southampton* (1887), 19 Q. B. D. 590; 56 L. J. M. C. 112; *Reg. v. Poole (Mayor)* (1887), 19 Q. B. D. 602, 683; 56 L. J. M. C. 131; *Reg. v. Wakefield (Mayor)* (1888), 20 Q. B. D. 810; 57 L. J. M. C. 52.

The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony drawing a carriage in which plaintiff's wife was riding, shied at the roller, upset the carriage, and the plaintiff's wife was killed. It was decided that the roller was an obstruction to the highway; that it was an unreasonable user of the highway by the defendant, and that the plaintiff was entitled to recover damages for the death of his wife under Lord Campbell's Act (b).

What's the
highway?

The right of the public to use a highway extends to the whole road and not merely to the part used as *via trita*. Therefore ditches fifteen inches wide and ten inches deep, cut completely across the strips of grass land at the sides of roads, so as to amount to a danger

Local Board, [1892] A. C. 345; 62 L. J. Q. B. 65; and *Sydney Municipal Council v. Bourke*, [1895] A. C. 433; 11 T. L. R. 403.

(z) *Vernon v. Vestry of St. James, Westminster*, *ubi sup.*

(a) *Reg. v. Duncan* (1881), 7 Q. B. D. 198; 50 L. J. M. C. 95. The most recent cases of obstruction of highways are: *Horne v. Cadman* (1886), 55 L. J. M. C.

110; 54 L. T. 421; *Hill v. Somerset* (1887), 51 J. P. 742; *Back v. Holmes* (1887), 57 L. J. M. C. 37; 56 L. T. 713; *Reg. v. Justices of London* (1890), 25 Q. B. D. 357; 59 L. J. M. C. 146.

(b) *Wilkins v. Day* (1883), 12 Q. B. D. 110; 49 L. T. 399; and see *Gully v. Smith* (1883), 12 Q. B. D. 121; 53 L. J. M. C. 35.

to persons walking along the strips, amount to a nuisance and obstruction (*c*).

The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road" *but subject to the payment of tolls by the persons using it*. It was decided that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under sect. 150 of the Public Health Act, 1875. It seems that, without legislative authority, an individual cannot dedicate a road to the public if he reserves a right to tolls for the user (*d*). Reserved tolls.

Persons using a traction engine and trucks on a highway may be indicted as a nuisance, *e. g.*, if they create a substantial obstruction and occasion delay and inconvenience to the public substantially greater than such as would arise from the use of carts and horses (*e*). Traction engine.

The reader would do well to refer to the following cases:—*Finch v. G. W. Ry. Co.* (1879), 5 Ex. D. 254; 41 L. T. 731; *Mayor of London v. Riggs* (1880), 49 L. J. Ch. 297; *Tillett v. Ward* (1882), 10 Q. B. D. 17; 52 L. J. Q. B. 61; *Normanton Gas Co. v. Pope and Pearson* (1883), 52 L. J. Q. B. 629; 32 W. R. 134; *The Queen v. Justices of Essex* (1883), 11 Q. B. D. 704; 49 L. T. 394; *Parkyn v. Preist* (1881), 7 Q. B. D. 313; 50 L. J. M. C. 148; *Corporation of Rochdale v. Justices of Lancashire* (1883), 8 App. Ca. 494; 53 L. J. M. C. 5; *Justices of West Riding of York v. The Queen* (1883), 8 App. Cas. 781; 53 L. J. M. C. 41; *Wallington v. Hoskins* (1880), 6 Q. B. D. 206; 50 L. J. M. C. 19; *Pickering Lytho East Highway Board v. Barry* (1881), 8 Q. B. D. 59; 51 L. J. M. C. 17; *The Queen v. Ellis* (1882), 8 Q. B. D. 466; *Alresford Rural Sanitary Authority v. Scott* (1881), 7 Q. B. D. 210; 50 L. J. M. C. 103; *Ramsden v. Yeates* (1881), 6 Q. B. D. 583; 50 L. J. M. C. 135; *Oxenhope District Local Board v. Bradford (Mayor)* (1882), 47 L. T. 344; 31 W. R. 322; *Dyson v. Greetland Local Board* (1884), 13 Q. B. D. 946; 53 L. J. M. C. 106; *Burton v. Salford Corporation* (1883), 11 Q. B. D. 286; 52 L. J. Q. B. 668; followed in *Graham v. Newcastle-upon-Tyne (Mayor)*, [1893] 1 Q. B. 643; 62 L. J. Q. B. 315; *Newton Improvement Commissioners v. Justices of* Other cases.

(*c*) *Nicol v. Beaumont* (1883), 53 L. J. Ch. 853; 50 L. T. 112.

(*d*) *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750; 55 L. J. Ch. 633.

(*e*) *Reg. v. Chittenden* (1885), 49 J. P. 503; 15 Cox, C. C. 725; as

to obstructions by stage coaches, see *R. v. Cross* (1812), 3 Camp. 224; as to the negligent management of a traction engine upon a highway, see *Smith v. Bailey*, [1891] 2 Q. B. 403; 60 L. J. Q. B. 779.

Lancashire (1884), 13 Q. B. D. 623; 48 J. P. 406; affirmed 54 L. J. M. C. 1; *Over-Darwen (Mayor) v. Lancaster (Justices)* (1884), 15 Q. B. D. 20; 54 L. J. M. C. 51; *Middlesbrough Overseers v. Yorkshire (N. R.) Justices* (1884), 12 Q. B. D. 239; 32 W. R. 671; *Reg. v. Cheshire Justices* (1884), 50 L. T. 483; 48 J. P. 262; *Illingworth v. Bulmer East Highway Board* (1884), 53 L. J. M. C. 60; 32 W. R. 450. By 47 & 48 Vict. c. 52, certain Turnpike Acts are continued and certain others repealed. *Loughborough Highway Board v. Curzon* (1886), 17 Q. B. D. 344; 55 L. J. M. C. 122; *Ellis v. Hulse* (1889), 23 Q. B. D. 24; 58 L. J. M. C. 91.

Contracts made and Torts committed Abroad, &c.

[147.]

FABRIGAS *v.* MOSTYN. (1775)

[Cowp. 161.]

In 1770 the Governor of Minorea was a gentleman named Mostyn, who apparently was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage. One of his subjects, however, a Mr. Fabrigas, did not coincide with him in this view, and he rendered himself so obnoxious that the governor, after keeping him imprisoned for a week, banished him to Spain.

It was for this arbitrary treatment that Fabrigas now brought an action *at Westminster*. Mostyn objected that, as the alleged trespass and false imprisonment had taken place in Minorea, the action could not be brought in England. But it was held that, as the cause of action was of a transitory and not a local nature, it could. And a British jury gave Fabrigas 3,000*l.* damages (*f*).

(*f*) See *Musgrave v. Pulido* P. C. 20, as to actions against the Governor of a British colony. (1879), 5 App. Cas. 102; 49 L. J.

Actions were formerly divided into *local* and *transitory*: *local*, such as could be tried only in the county in which the cause of action arose (*e.g.*, an action of trespass to land); *transitory*, such as could be tried wherever the plaintiff chose (*e.g.*, an action for an assault). But, through a provision of the Judicature Act, which abolishes local venue and allows the plaintiff, subject to its being changed by a judge, to name any county he pleases for the place of trial, the leading case has lost much of its old importance. The rules of procedure under the Judicature Acts with regard to local venue (Order XXXVI. r. 1) did not, however, confer any new jurisdiction. On this subject the recent decision of the House of Lords in the case of *British South Africa Co. v. Companhia de Moçambique* (*g*) should be consulted. It was there held (reversing the decision of the Court of Appeal) that the Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad. The learned judgment delivered by Lord Herschell is well worthy of careful study.

The leading case may be still, however, taken to "lead" as to the law relating to contracts entered into abroad and sought to be enforced in England. Such contracts are primarily to be expounded according to the law of the place where made,—the *lex loci contractûs*, as it is called (*h*). For example, if by the French law (*i*) the property in a bill of exchange payable to order is not passed without a *special* indorsement, the holder of a bill drawn in France and there indorsed to him *in blank*, cannot sue on it here, although in the case of an English bill a blank indorsement would have sufficed. But this rule admits of an exception in the case where the parties intended the contract to be executed in a country other than that in which it was entered into. Where a contract is entered into between parties residing under different systems of law, the Court is not bound as a matter of law to apply either the *lex loci solutionis* or the *lex loci contractûs*. The question is what law the parties intended to govern the contract, as to which both these circumstances are, of course, important (*k*). Contracts which are illegal according to English law, though legal according to the law of the country where made, cannot be enforced in England (*l*). "When

Local and
transitory.

Contracts
made
abroad.

(*g*) [1893] A. C. 602; 63 L. J. Q. B. 70.

(*h*) *Jacobs v. Credit Lyonnais* (1884), 12 Q. B. D. 589; 53 L. J. Q. B. 156; *Lee v. Abdy* (1886), 17 Q. B. D. 309; 55 L. T. 297; *Ex parte Dever* (1887), 18 Q. B. D. 669; 56 L. J. Q. B. 552.

(*i*) *Trimby v. Vignier* (1831), 1 Bing. N. C. 151; 6 C. & P. 25;

Bradlaugh v. De Rin (1870), L. R. 5 C. P. 473; 39 L. J. C. P. 251; and see *Horne v. Rouquette* (1878), 3 Q. B. D. 514; 39 L. T. 219; and *Alcock v. Smith*, [1892] 1 Ch. 238; 61 L. J. Ch. 161.

(*k*) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; 71 L. T. 1.

(*l*) *Santos v. Illidge* (1860), 8 C. B. N. S. 861; 29 L. J. C. P. 318.

a Court of justice in one country is called on to enforce a contract entered into in another country, the question is not only whether or not the contract is valid according to the law of the country in which it is entered into, but whether or not it is consistent with the law and policy of the country in which it is to be enforced; and if it is opposed to those laws and that policy, the Court cannot be called on to enforce it" (*m*). Thus, the rule that a contract in restraint of trade is void, unless confined within what is reasonably necessary for the protection of the contractee, is a rule applicable to contracts made abroad and between aliens (*n*). And although a contract is to be expounded according to the law of the place where made, *proceedings to enforce it* are governed by the law of the place where the action is brought—the *lex loci fori*. For example, if an agreement be one of that class which the 4th section of the Statute of Frauds requires to be in writing, a verbal agreement made in a foreign country where it would have been perfectly valid cannot be enforced in England (*o*). Similarly, an action on a contract entered into in Scotland, and which might by the laws of that country have been enforced within forty years, has been held to be barred by the English Statute of Limitations (*p*).

The title to certificates of American railroad shares, those certificates being in England, and the title to them depending on dealings in England, must be decided by English law; but the consequences of the title to the certificates, with regard to the title to the shares, must be decided by American law (*q*).

Powers of attorney.

So, where a power of attorney is executed in a foreign country in the language of that country, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, lawyers of the country, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country (*r*).

Marriage liabilities.

By the law of Jersey, a husband is still liable for the ante-nuptial debts of his wife. In England, if the marriage has taken place since July 30, 1874, he is liable only to the extent of certain speci-

(*m*) Per Turner, L. J., in *Hope v. Hope* (1857), 8 D. M. & G. 731; 26 L. J. Ch. 417.

(*n*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; 49 L. J. Ch. 338.

(*o*) *Leroux v. Brown* (1852), 12 C. B. 804; 22 L. J. C. P. 1.

(*p*) *British Linen Co. v. Drummond* (1830), 10 B. & C. 903;

Alliance Bank of Simla v. Carey (1880), 5 C. P. D. 429; 49 L. J. C. P. 781.

(*q*) *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; 60 L. J. Ch. 131.

(*r*) *Chatenay v. Brazilian Telegraph Co.*, [1891] 1 Q. B. 79; 60 L. J. Q. B. 295.

fied assets. A Jersey girl contracted debts in Jersey, and then came to England, and, after July 30, 1874, got married. The lady's Jersey creditor brought an action against the husband, urging that the *lex loci contractûs* ought to prevail, and that the husband was liable. But it was held that the husband was not liable, as, the marriage having taken place in England, the Jersey law did not apply (*s*).

It may be observed that when a contract is entered into by letter between two persons living in different countries, the place where the contract is considered to have been made, so as to determine the *lex loci contractûs*, is the place where the final assent has been given by the one party to an offer made by the other.

The Courts of this country will not recognize a state of disability which is unknown to our laws. They will not, for instance, take notice of a personal disqualification caused by a change of *status*, not arising from the law of nature, but from the principles of the customary or positive law of a foreign country (*t*).

French
"prodigal" can
sue here.

A union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman, to the exclusion of all others" (*u*).

Marriage.

The validity of a marriage contracted in England, though the domicile of one of the parties may be foreign, is decided according to the law of England (*x*): but it has been decided that the question of divorce is not an incident of the marriage contract to be governed by the *lex loci contractûs*. The power of dissolving the marriage tie is an incident of status to be regulated by the law of the domicile of the parties—that is, of the husband, for immediately upon marriage the wife's domicile becomes that of her husband. Thus (*y*) an English Court will recognize as valid the decree of a Scotch Court dissolving the marriage of a domiciled Scotchman and an Englishwoman, although the marriage was solemnized in England,

Divorce.

(*s*) *De Greuchy v. Wills* (1879), 4 C. P. D. 362; 48 L. J. C. P. 726.

(*t*) *Worms v. De Valdor* (1880), 49 L. J. Ch. 261; 41 L. T. 791.

(*u*) *In re Bethell*, *Bethell v. Hildyard* (1888), 38 Ch. D. 220; 57 L. J. Ch. 487, a case where an Englishman went through the ceremony of marriage with a woman of the Baradong tribe in Bechuana-land according to the customs of

the tribe, among whom polygamy is allowed.

(*x*) *Sottomayer v. De Barros* (1879), 5 P. D. 94; 49 L. J. P. 1; *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637; 56 L. T. 737.

(*y*) *Harvey v. Farnie* (1882), 8 App. Cas. 43; 52 L. J. P. 33. And see *Green v. Green*, [1893] P. 89; 62 L. J. P. 112.

and was dissolved upon a ground for which by English law no divorce could have been granted.

A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled (z).

Torts
committed
abroad.

As to torts committed abroad, an action lies in England, provided that the tort is actionable both by our law and by the law of the country where the tort was committed. The case of *Phillips v. Eyre* (a) shows how necessary it is that both of these conditions should be fulfilled. It was an action for assault and false imprisonment against the ex-governor of Jamaica, the trespass complained of having been committed during a rebellion in that island. The defendant successfully relied on an Act of Indemnity which the Jamaica Legislature had passed, and said that legislation, though *ex post facto*, cured the wrongfulness of his acts, and prevented the plaintiff from recovering. The case of *The Halley* (b) is another authority on the subject. By the negligence of a pilot, compulsorily taken on board, *The Halley*, a British steamer in Belgian waters, ran down a Norwegian vessel, *The Napoleon*. By Belgian law the Britisher was liable, but by our law the fact that the pilot was on board, and that the collision was due to his negligence, exempted her. It was held that, under those circumstances, no action lay against her in England. "It is," the Court said, "in their lordships' opinion, alike contrary to principle and to authority to hold that an English Court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed." But waste committed by a tenant in tail is not regarded as a tort, but as a breach of an obligation in the nature of an implied contract (c).

But, on the other hand, it is no defence to an action for a tort committed in a foreign country that by the laws of that country no action lies till the defendant has been dealt with criminally, for that is a mere matter of procedure (d).

Foreign
law, how
proved.

The Courts do not take judicial notice of the laws of foreign states. Such laws are proved by the oral evidence of persons having a practical acquaintance with them, and whether any

(z) *Gibbs v. Société des Métaux* (1890), 25 Q. B. D. 399; 59 L. J. Q. B. 510.

(a) (1870), L. R. 6 Q. B. 1; 40 L. J. Q. B. 28.

(b) (1868), L. R. 2 P. C. 193; 37 L. J. Adm. 33.

(c) *Batthyany v. Walford* (1887), 36 Ch. D. 269; 56 L. J. Ch. 881.

(d) *Scott v. Seymour* (1862), 1 H. & C. 219; 32 L. J. Ex. 61.

particular person tendered as a witness is duly competent is a question for the Court. In a case^(e) in which the question was whether a London hotel-keeper, but a native of Belgium, and who had been a merchant in Brussels, was competent to prove the law of Belgium as to the presentment of promissory notes, Talfourd, J., said: "Foreign law is matter of fact: any person who can satisfy the Court that he has the means of knowing it is an admissible witness to prove it. One who has been long in the habit of attending as a special jurymen in the city of London would no doubt be well qualified to speak as to the law of England on many subjects connected with commerce. As to the *admissibility* of this person's evidence, I think there can be no doubt, whatever may have been the *weight* it was entitled to." If witnesses called to prove foreign law refer to any passages in the code of their country, as containing the law applicable to the case, the Court is at liberty to look at those passages and consider what is their proper meaning^(f).

The judgment of a foreign Court in any proceeding *in personam*, if final and conclusive where made, and if not plainly contrary to natural justice, is^(g) final and conclusive here.

Where, however, an action is brought to enforce a foreign judgment, the defendant may raise the defence that such judgment was obtained by the fraud of the plaintiff, even although the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court^(h).

The owner of cargo who ships it on board a foreign vessel ships it to be dealt with by the master according to the law of the flag, that is, the law of the country to which the vessel belongs, unless the circumstances under which the contract was entered into show that the parties intended it to be governed by the law of some other country⁽ⁱ⁾.

The Court will not determine a contested claim to land situate in a foreign country strictly so called, being no part of the British

(e) *Vander Donckt v. Thellusson* (1849), 8 C. B. 812; 19 L. J. C. P. 12; see also *Hawksford v. Giffard* (1886), 12 App. Ca. 122; 56 L. J. P. C. 10.

(f) *Concha v. Murrieta* (1889), 40 Ch. D. 543; 60 L. T. 798.

(g) *Richardo v. Garcias* (1845), 12 Cl. & Fin. 368; *Grant v. Easton* (1883), 13 Q. B. D. 302; 53 L. J. Q. B. 68; *Nouvion v. Freeman* (1889), 15 App. Ca. 1; 59 L. J. Ch. 337.

(h) *Vadala v. Lawes* (1890), 25

Q. B. D. 310; 63 L. T. 128; *Abouloff v. Oppenheimer* (1883), 10 Q. B. D. 295; 52 L. J. Q. B. 6.

(i) *The Gaetano and Maria* (1882), 7 P. D. 1, 137; 51 L. J. P. 67; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321; 58 L. J. Ch. 721; *The August*, [1891] P. 328; 60 L. J. P. 57; *The Industrie*, [1891] P. 58; 63 L. J. P. 81.

Law of
the flag.

dominions, simply because the plaintiff and defendant are in this country (*k*).

Unsealed
lease.

By Scotch law an instrument under seal is not necessary for the conveyance of a sporting right, and therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English Courts, as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament is not part of the *lex fori* (*l*).

Negli-
gence.

In an action *in personam*, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel, it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain. It was decided that such a defence was bad upon demurrer (*m*).

Colonial
law.

In *Bateman v. Service* it was held that the Western Australian Joint Stock Companies Ordinance Act, 1858, does not apply to foreign corporations or to companies incorporated out of Western Australia, and properly and lawfully carrying on business as such. Consequently, a limited company incorporated elsewhere, not having complied with its provisions, can nevertheless carry on business and make contracts in Western Australia by its agent without its members being liable individually for its debts and engagements, and that a company duly registered and incorporated in Victoria, could not be again registered as a company in Western Australia (*n*).

Proof of
Persian
law.

D. M. K., a Persian subject, was by a decree of a Persian Court declared entitled to certain property in this country. The decree, though founded partly upon a will, made no mention of it, and the Court which had custody of the will refused to give a copy of it. The Court of Probate granted letters of administration limited to the property mentioned in a duly authenticated copy of the decree. The Court allowed the law applicable to the case to be proved by a Persian ambassador (*o*).

(*k*) *In re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; 52 L. J. Ch. 759.

(*l*) *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403; 52 L. J. Q. B. 607.

(*m*) *The Leon* (1881), 6 P. D. 148; 50 L. J. P. 59.

(*n*) *Bateman v. Service* (1881), 6 App. Ca. 386; *Bulkeley v. Schutz* (1871), L. R. 3 P. C. 764; 8 Moore, P. C. C. N. S. 170.

(*o*) *In the Goods of Dost Aly Khan* (1880), 6 P. D. 6; 49 L. J. P. 78.

A bequest of personalty in an English will to the children of a foreigner must be construed to mean to his legitimate children, and by international law as recognised in this country, those children are legitimate whose legitimacy is established by the law of their father's domicile (*p*).

The domicile of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom (*q*). The original domicile of a legitimate child is that of its father at the time of its birth, but an illegitimate child takes the domicile of its mother (*r*), and throughout infancy the child's domicile generally, but not necessarily (*s*), follows that of its parent through any changes that may occur. The domicile of a child who has never been of sound mind since attaining majority continues to follow the changes of its father's domicile; the incapacity of lunacy is in this case a mere prolongation of the incapacity of minority. The domicile of a wife is that of her husband. A person may change his domicile by establishing in a new country a permanent residence; the actual duration of the residence is only important as evidence of intention, which must be *quatenus in illo exuere patriam* (*t*). It should be observed that domicile is established by conduct, and not by assertion (*u*). A change of domicile must be a residence *sine animo revertendi*. A temporary residence for the purposes of health, travel, or business does not change the domicile. Every presumption is to be made in favour of the original domicile, and no change can occur without an actual residence in a new country, and a clear intention of abandoning the old (*x*). The following recent cases on domicile may be referred to:—*Abd-ul-Messih v. Farra* (1888), 13 App. Ca. 431; 57 L. J. P. C. 88; *In re Tootall's Trusts* (1882), 23 Ch. D. 532; 52 L. J. Ch. 664; *Bloxam v. Favre* (1884), 9 P. D. 130; 53 L. J. P. 26; *Ex parte Cunningham* (1884), 13 Q. B. D. 418; 53 L. J. Ch. 1067; *Bradford v. Young* (1885), 29 Ch. D. 617; 53 L. T. 407; *In re Patience* (1885), 29 Ch. D. 976; 54 L. J. Ch. 897; *In re Macreight* (1885), 30 Ch. D. 165; 55 L. J. Ch. 28; *In re Marrett, Chalmers v. Wingfield* (1887), 36 Ch. D. 400; 57 L. T. 896;

(*p*) *In re Andros, Andros v. Andros* (1883), 24 Ch. D. 637; 52 L. J. Ch. 793; and see *In re Grey, Grey v. Stamford*, [1892] 3 Ch. 88; 61 L. J. Ch. 622.

(*q*) *Craignish v. Hewitt*, [1892] 3 Ch. 180; 67 L. T. 689.

(*r*) *Urquhart v. Butterfield* (1887), 37 Ch. D. 357; 57 L. J. Ch. 521.

(*s*) See *In re Beaumont*, [1895] 3 Ch. 490; 62 L. J. Ch. 923.

(*t*) Per Lord Cranworth in *Moorhouse v. Lord* (1863), 10 H. L. Ca. 272.

(*u*) *McMullen v. Wadsworth* (1889), 14 App. Ca. 631; 59 L. J. P. C. 7.

(*x*) *Lauderdale Peerage case* (1885), 10 App. Ca. 692. For a full discussion of the law of domicile, see *Wetlake on Private International Law*, 3rd ed., p. 281, and *Dicey on the Law of Domicil*.

In re Grove, *Vaucher v. Solicitor to the Treasury* (1888), 40 Ch. D. 216; 58 L. J. Ch. 57; *Turner v. Thompson* (1888), 13 P. D. 37; 57 L. J. P. 40; *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P. D. 132; 57 L. J. P. 101; *In re Hernando*, *Hernando v. Sawtell* (1884), 27 Ch. D. 284; 53 L. J. Ch. 865; *Hurley v. Hurley* (1892), 67 L. T. 384; *Goulder v. Goulder*, [1892] P. 240; 61 L. J. P. 117.

Appear-
ance
without
protest.

A testator, who was domiciled and resident in Scotland, and whose will was in Scotch form, appointed six executors, two of whom were resident in England; another, being a Scotch member of Parliament, resided in England during the session; and the other three resided in Scotland. The value of the estate was about £500,000, and it was all in Scotland with the exception of about £25,000, which was in England. The executors proved the will in Scotland, and constituted themselves legal personal representatives in England, and removed all the English personalty to Scotland. An action was then commenced in England by a plaintiff resident there, who was entitled to a share of a legacy, and also of the residue, for the administration of the estate. Three of the trustees were served in England and the other three in Scotland, and they entered an appearance without any protest, and took no steps to discharge the order. No action was pending in Scotland for the administration of the estate there. It was decided that the Court at the trial has no discretion, and that the plaintiff was entitled to the ordinary decree for the administration of the whole estate. But if the executors had appeared conditionally, and applied to discharge the order for service in Scotland, the Court would have considered the question as to whether it was convenient to have the estate administered in England (*y*).

Foreign
personal
assets.

Foreign personal assets are governed by the *lex domicilii* of the deceased owner for the purpose of succession and enjoyment. For the purpose of legal representation, of collection, and of administration as distinguished from distribution among the successors, they are governed by the *lex loci* (*z*). In the recent case of *Duncan v. Lawson* (*a*), it was held that leaseholds in England, belonging to a domiciled Scotchman, devolve, in case of his intestacy, upon the persons entitled according to the English Statute of Distributions.

Crime.

All crime is local. The jurisdiction over crime belongs to the country where the crime is committed, and except over her own

(*y*) *In re Orr-Ewing*, *Orr-Ewing v. Orr-Ewing* (1883), 9 App. Ca. 31; 53 L. J. Ch. 435; and see 10 App. Ca. 453; 53 L. T. 826.

(*z*) *Blackwood v. Reg.* (1882), 8 App. Ca. 82; 52 L. J. P. C. 10.

See *In re Trufort*, *Trafford v. Blanc* (1887), 36 Ch. D. 600; 57 L. J. Ch. 135.

(*a*) (1889), 41 Ch. D. 394; 58 L. J. Ch. 502.

subjects, her Majesty and the Imperial Legislature have no power whatever (*b*).

The following cases may also be referred to:—*Greer v. Poole* (1880), 5 Q. B. D. 272, how far foreign law is applicable to an English policy of marine insurance effected upon goods shipped in a foreign ship; *In re Marseilles, &c. Railway Co.* (1885), 30 Ch. D. 598; 55 L. J. Ch. 116, bills of exchange were drawn in France by a domiciled Frenchman, in the French language, in English form, on an English company, who duly accepted them. The drawer having indorsed the bills, and sent them to an Englishman in England, it was held that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law; *In re Matheson* (1884), 27 Ch. D. 225; 51 L. T. 111, jurisdiction to wind up a foreign company with branch office, assets, and liabilities in England; *In re Kloebe, Kannreuther v. Geiselsbrecht* (1884), 28 Ch. D. 175; 54 L. J. Ch. 297, in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends “*pari passu*” with English creditors.

Other cases.

Presumption of Death after Seven Years' Absence.

NEPEAN *v.* DOE. (1837)

[148.]

[2 M. & W. 894; 5 B. & Ad. 86.]

The effect of this case is that when a person goes abroad and is not heard of for seven years the law presumes him to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death, but does not presume that he died at any particular period during those seven years.

Distressing cases, leading to litigation, occasionally arise where whole families have perished by the same calamity. One well-known case on the subject is *Wing v. Angrave* (*c*), where a husband, wife, and children were all washed away by the same wave.

Case of several perishing by same calamity.

(*b*) See *MacLeod v. Att.-Gen.*, [1891] A. C. 455; 60 L. J. P. C. 55.

(*c*) (1860), 3 H. L. C. 183; 30 L. J. Ch. 65. And see *In re Alston*, [1892] P. 112; 61 L. J. P. 92.

Roman law.

In the Roman law, if a father and son died under such circumstances it was presumed that the son died first if he was under the age of puberty, but if he was over that age that the father died first; the principle being that the father would probably be the stronger of the two in the former case, and the son in the latter.

No presumption in English law.

We have no presumptions of this kind, and when a similar case arises we call on a claimant, by survivorship, to give affirmative proof of what he asserts. In *Elliott v. Smith* (*d*), a testator left legacies to three persons, and if any of them died in the testator's lifetime, his share was to go to the others. One of the legatees and the testator died at the same instant. It was held that the legacy of the legatee so dying became part of the residue.

Meaning of "not being heard of."

The meaning of "not being heard of for seven years" was much discussed in the case of the Prudential Assurance Company *v.* Edmonds (*e*); and although there was considerable difference of opinion on the special circumstances of that case, it may be taken as clear that there is no absolute and positive rule of law that a mere physical hearing would put an end to the presumption of death. "Not being heard of" means this: that enquiry has been made, and that no member of the family has heard anything about the missing man which might raise a reasonable doubt in their minds whether he must have been no more. This, however, is not a complete and comprehensive explanation, because, even if a statement creating a reasonable doubt has been made to the family, and the foundation of such statement is subsequently disproved, then of course it will go for nothing, and the presumption of death will, in the absence of further evidence, arise.

Case of Prudential Assurance Co. *v.* Edmonds.

Thus, in the case last mentioned, a member of the family stated that on one occasion during the seven years, she saw a man whom she believed to be the missing one, but before she could speak to him he was lost in the passing crowd. This circumstance she at once communicated to her relatives; but it was held that the presumption of death would not thereby be rebutted, unless the jury found as a fact that she was not mistaken in her identification.

A person will not be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive (*f*).

No presumption as to time of death.

The question at what time within the period of seven years the lost man died is not a matter of presumption, but of evidence, and

(*d*) (1882), 22 Ch. D. 236; 52 L. J. Ch. 222.

(*e*) (1877), 2 App. Cas. 437.

(*f*) *Watson v. England* (1844), 14 Sim. 28; 8 Jur. 1062; *Bowden v. Henderson* (1854), 2 Sm. & G. 360.

the onus of proving that the death took place at any particular time lies upon the person who claims a right to the establishment of which that fact is essential. Thus, in a well-known case (*g*), a testator died in January, 1861, having bequeathed his residuary estate equally between his nephews and nieces. One of the nephews had gone to America many years before, and was last heard of as alive in June, 1860. In the year 1869 his personal representative sought to establish his title to the share of the missing one; but the attempt was unsuccessful, for although there was a presumption that the last man was dead at the time of the application in 1869, there was no presumption that he was alive at the time of the testator's death, and therefore no evidence that he was ever entitled to any share at all. There is no presumption of law in favour of the continuance of life, though an inference of fact may clearly be legitimately drawn that a person alive and in health on a certain day was alive a short time afterwards. Thus, in *Re Tindall* (*h*), a young sailor was last seen in the summer of 1840 going to Portsmouth to embark. His grandmother died in March, 1841, and the Court presumed that he was the survivor.

In re
Phenè's
Trusts.

It is important to observe that where the missing person does not take a share under a will, as *In re Phenè's Trusts*, but under a settlement containing a trust in his favour, a different rule would appear to apply. In the case of a settlement containing a trust for a person named, such person must, at any rate according to Hall, V.-C. (*i*), "until the contrary is shown, be taken to have been in existence at the date of that settlement. The trust, then, being so created, the representative of that person (he being dead) is entitled to the benefit of that trust until those who say that the trust failed altogether prove such failure by affirmative evidence."

In re Cor-
bishley's
Trusts.

A somewhat curious case (*k*) of conflicting presumptions recently came before the Court of Crown Cases Reserved. A marriage admitted to be valid, was contracted by the prisoner in 1864; there was evidence that the woman then married to the prisoner was alive in 1868. In 1879 the prisoner went through the ceremony of

Conflicting
presump-
tions in
bigamy
cases.

(*g*) *In re Phenè's Trusts* (1870), L. R. 5 Ch. 139; 39 L. J. Ch. 316; see also *In re Rhodes*, *Rhodes v. Rhodes* (1887), 36 Ch. D. 586; 56 L. J. Ch. 825; *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298; 11 L. T. 47; *Lambe v. Orton* (1859), 29 L. J. Ch. 286; 6 Jur. N. S. 61; *In re Lawes* (1871), L. R. 6 Ch. 356; 40 L. J. Ch. 602.

(*h*) 1861, 39 Beav. 151; and see *Pennefather v. Pennefather*

(1872), 6 Ir. R. Eq. 171.

(*i*) *In re Corbishley's Trusts* (1880), 11 Ch. D. 816; 49 L. J. Ch. 266.

(*k*) *Reg. v. Willshire* (1881), 6 Q. B. D. 366; 14 Cox, C. C. 541; and see *Reg. v. Briggs* (1856), 7 Cox, C. C. 175; 26 L. J. M. C. 7; *Reg. v. Curgarwen* (1865), L. R. 1 C. C. 1; 10 Cox, C. C. 152; *Reg. v. Lumley* (1869), L. R. 1 C. C. 196; 11 Cox, C. C. 271.

marriage with another woman, and again, in 1880, with a third, and was thereupon indicted for bigamy. The wife alleged in the indictment to be alive at the time of the commission of the offence was the one with whom the prisoner had gone through a form of marriage in 1879. It was held that on these facts the prisoner ought not to have been convicted, as the jury had not found affirmatively that the wife married in 1864 was dead at the time of the celebration of the marriage in 1879. It is true that, if nothing was heard of the first woman after 1868, the prisoner could not have been convicted of bigamy in respect of the marriage of 1879; but, so far as the charge under the consideration of the Court was concerned, it was held that "there was a presumption that her life continued. The only evidence to the contrary was that the prisoner presented himself as a bachelor to be married in 1879. Whether that would have satisfied the jury that his former wife was then dead was a question for them to decide, but it was not left to them for decision" (l).

A *bonâ fide* belief on reasonable grounds in the death of her husband by a woman who had gone through the ceremony of marriage within seven years after she had been deserted by her husband, forms a good defence to an indictment for bigamy (m).

Evidence
of death.

Money was payable to a tenant *pur autre vie* under a policy, after proof, to the satisfaction of directors, of the *cestui que vie*. An order was made under 6 Anne, c. 72, that the *cestui que vie* ought to be deemed and taken to be dead under the statute, and the remaindermen entered. The Court held that the directors might reasonably require further evidence of the death of the *cestui que vie* (n).

(l) Per Hawkins, J.

(m) So decided by a majority of nine judges against five in the Court of Crown Cases Reserved in *Reg. v. Tolson* (1889), 23 Q. B. D. 168; 16 Cox, C. C. 629. There had been previously a conflict of authorities, *Reg. v. Turner*, 9 Cox, C. C. 145; *Reg. v. Horton*, 11 Cox, C. C. 670; *Reg. v. Moore*,

13 Cox, C. C. 544, being in the prisoner's favour; *Reg. v. Gibbons*, 12 Cox, C. C. 237; *Reg. v. Bennett*, 14 Cox, C. C. 45, being to the contrary effect.

(n) *Doyle v. City of Glasgow Life Assurance Co.* (1884), 53 L. J. Ch. 527; 50 L. T. 323; but see *Willyams v. Scottish Widows' Fund* (1888), 52 J. P. 471.

Estoppel.

DUCHESS OF KINGSTON'S CASE. (1776) [149.]

[20 How. St. Tr. ; 1 LEACH, C. C. 146.]

This was a prosecution for bigamy, and the judges were required to answer the following questions :—

(1.) If a spiritual Court decides that a marriage is null and void, is its decision so conclusive on the subject that the marriage cannot be proved against one of the parties in an indictment for bigamy?

(2.) Supposing the spiritual Court's decision *is* final, may counsel for the prosecution destroy its effect by showing that it was brought about by fraud and collusion?

The first question was answered in the negative, so that it did not much matter what the answer to the second was. That question, however, the judges answered in the affirmative.

YOUNG v. GROTE. (1827) [150.]

[4 BING. 253; 12 MOORE, 484.]

Mr. Young when he went away from home used to leave blank cheques signed for Mrs. Young to fill up according to her necessities. But on one occasion Mrs. Young did it so clumsily that a bearer was able to alter "50" to "350," and "fifty" to "three hundred and fifty," and get the cheque cashed in its altered form. On these facts, Mr. Young was held to be estopped by his negligence from throwing the loss on his bankers (*nn*).

Estoppels (which Lord Coke considered "a curious and excellent sort of learning") are of three kinds :—

Various
kinds of
estoppel.

1. By matter of record.

2. By deed.

3. By conduct (otherwise known as *in pais*).

(*nn*) See Lord Esher's criticism of this case, *post*, p. 536.

Estoppel
by record.

1. Generally, when the parties are the same, and the point litigated the same, a former judgment recorded is conclusive. Thus, if a record in a former action is tendered in evidence, the other side cannot be permitted to show that the officer of the Court made a mistake and entered the verdict on the wrong plea (*o*). So, too, if in an action of trespass by Jones against Brown, an issue is taken on the plea that the land belongs to Brown, and final judgment is entered on this issue in favour of Jones, Brown cannot, in a subsequent action against the same defendant for trespass by digging up coals in the same land, plead that the land is his and not Jones's (*p*). But if a plaintiff sues in a different right in the second action from what he did in the first (*e.g.*, if the administratrix of a person who has been killed by the negligence of a railway company sues first under Lord Campbell's Act, and then, in another action, for damage to the personal estate) there is no estoppel (*q*).

In order to establish the plea of *res judicata*, the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the matter in question (*r*).

Judgment
by consent.

A judgment *by consent* operates as an estoppel *inter partes* as much as if the case had been fought out. It makes no difference that the Court has not exercised its mind on the matters in controversy (*s*).

As to when an unsatisfied judgment against one joint contractor is a bar to an action against the other joint contractor, the following cases should be consulted:—*King v. Hoare* (1844), 13 M. & W. 494; *Kendall v. Hamilton* (1879), 4 App. Ca. 504; 48 L. J. C. P. 705; *Wegg-Prosser v. Evans*, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1, overruling *Cambefort v. Chapman* (1887), 19 Q. B. D. 229; 56 L. J. Q. B. 639; *In re Hodgson*, *Beckett v. Ramsdale* (1885), 31 Ch. D. 177; 55 L. J. Ch. 241; *Weall v. James* (1893), 68 L. T. 515; 4 R. 356. In the recent case of *Hoare v. Niblett*, [1891] 1 Q. B.

(*o*) *Reed v. Jackson* (1801), 1 East, 355; and see *Pearreth v. Marriott* (1882), 22 Ch. D. 182; 52 L. J. Ch. 221; *In re Defries*, *Norton v. Levy* (1883), 48 L. T. 703; 31 W. R. 720; *In re May* (1885), 28 Ch. D. 516; 54 L. J. Ch. 338; *Caird v. Moss* (1886), 33 Ch. D. 22; 55 L. J. Ch. 854, an action for rectification of an agreement already construed by the Court; *Macdougall v. Knight* (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517.

(*p*) *Outram v. Morewood* (1803), 3 East, 346. And see *Butler v. Butler*, [1894] P. 25; 63 L. J. P. 1.

(*q*) *Leggott v. G. N. Ry. Co.* (1876), 1 Q. B. D. 599; 45 L. J. Q. B. 557; *Daly v. Dublin, Wicklow & Wexford Ry.* (1892), 30 L. R. Ir. 514.

(*r*) See Att.-Gen. for Trinidad *v. Eriché*, [1892] A. C. 518; 63 L. J. P. C. 6.

(*s*) *In re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37; 71 L. T. 594. But see *Magnus v. National Bank of Scotland* (1888), 57 L. J. Ch. 902; 58 L. T. 617; *Norman v. Norman* (1889), 43 Ch. D. 296; 61 L. T. 637.

781; 60 L. J. Q. B. 565, the rule was held applicable to a case where one of the joint contractors was a married woman contracting in respect of her separate property.

It is to be observed that in an estoppel by record, not only the parties to the action themselves, but their privies also (*i.e.*, those who claim under them), are estopped. But, although a judgment is conclusive proof as against everybody of the existence of that state of things which is the legal effect of the judgment, yet, on the principle *res inter alios actu alteri nocere non potest*, it is not, so far as strangers are concerned, conclusive proof of the facts stated to be the grounds on which it is based. How far a judgment is conclusive as between parties and privies of facts forming the ground of the judgment may, perhaps, be a question admitting of some doubt. Mr. Justice Stephen, in his Digest of the Law of Evidence, says (*t*): "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action, in which that judgment is intended to be proved." Vice-Chancellor Knight-Bruce, however, expressed his opinion on the subject thus (*u*): "It is, I think, to be collected that the rule, against re-agitating matter adjudicated, is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object." These remarks were quoted with approval by Selborne, L. C., in a case (*x*) in which the facts were these: An application to justices by a local board to recover a proportion of sewerage expenses from the owner of premises abutting on the street in which the sewer had been laid, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. Some years afterwards the local board made a similar application against the same person in respect of the same premises. The Court of Appeal (reversing the decision of the Queen's Bench Division) held that,

Judgment not conclusive as to strangers, as to grounds on which it is based.

How far this applies to parties and privies.

Statement of law by Stephen, J.

V.-C. Knight-Bruce's opinion.

Reg. v. Hutchings.

(*t*) 5th ed., p. 51.

(*u*) 2 Sm. L. C., 7th ed., p. 807.

(*x*) Reg. v. Hutchings (1881), 6

Q. B. D. 300; 50 L. J. M. C. 35;

see also per Chitty, J., *In re Allsop* and Joy (1889), 61 L. T. 213.

under these circumstances, the adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application. The ground of this decision would seem to be that the justices exceeded their jurisdiction in stating the reason on which their dismissal of the application had been based; and, if they had merely found, as they ought to have done, that the complaint of the local board was not proved, the order of dismissal could not have operated as an estoppel except against a repetition of the same demand for the same quota of expenses. And in the recent case of *Heath v. Weaverham Overseers* (y), it was held that in determining whether a decision operates as an estoppel, the Court in a subsequent case is entitled to consider what facts were before the Court in the former case, and to give effect to any fresh facts that had subsequently taken place.

Fraud, mistake, or collusion may be proved.

It is to be observed that when a judgment is put in evidence the person against whom it is offered may prove that it was obtained by any fraud or collusion to which neither he, nor anyone to whom he is a privy, was a party. Thus, it was held recently (z) that it is a good defence to an action on a foreign judgment, that such judgment was procured by the fraudulent misrepresentation of the plaintiff. And it may be stated generally the Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties, *e.g.*, common mistake (a).

File of bankruptcy proceedings.

The file of the proceedings in a bankruptcy is not in the nature of a record, so as to create an estoppel. Thus, the mere fact that a proof has been upon the file of the proceedings in a bankruptcy does not estop the bankrupt from applying to the Court to reduce the amount of such proof (b).

Estoppel by deed.

2. To execute a deed is a very solemn thing, and therefore whatever assertion a man has made in his deed he must stand by. If you execute a bond in one name, you are estopped from pleading that your name is otherwise. So, though a person who has given an *ordinary* receipt may show that he has never really received the money, a person who has given a receipt under *seal* cannot. And the *recitals* in a deed are just as binding as any other part. “I do

(y) [1894] 2 Q. B. 108; 63 L. J. M. C. 187.

(z) *Aboulloff v. Oppenheimer* (1883), 10 Q. B. D. 295; 52 L. J. Q. B. 6; and see *Vadala v. Lawes* (1890), 25 Q. B. D. 310; 63 L. T. 128.

(a) See *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273; 64 L. J. Ch. 523.

(b) *Ex parte Bacon, In re Bond* (1881), 17 Ch. D. 447; 44 L. T. 834; and see *Keate v. Phillips* (1881), 18 Ch. D. 560; 50 L. J. Ch. 664.

not see," said a judge once, "that a statement such as this is the less positive because it is introduced by a 'Whereas.'"

So, too, a company which issues a share certificate stating that the person therein named is the proprietor and duly registered owner of a specified number of shares in the company is estopped from afterwards denying his title to the shares, and is liable for damages for refusing to register a transfer from him (*c*). Share certificate of company.

Two qualifications of the doctrine of estoppel by deed must be remembered:—

(1.) Although a person acknowledges in his deed that he has received the consideration money for the service he undertakes to perform, he may nevertheless show that as a matter of fact he has not received it.

(2.) A person who is sued on his *deed* may show that it is founded on fraud or illegality, and if he proves it, the document becomes worthless. The leading case on this subject is *Collins v. Blantern*, *ante*, p. 136.

No estoppel can be raised on a document which is inconsistent with the document itself (*d*).

3. The doctrine of estoppel by conduct is, perhaps, best laid down in one of the luminous judgments of Baron Parke. "The rule in *Pickard v. Sears*" (*e*), said that eminent judge in *Freeman v. Cooke* (*f*), is "that where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" . . . "the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or Estoppel in pais.

(*c*) *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; 63 L. J. Q. B. 134.

(*d*) *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36; 56 L. J. Ch.

1089.

(*e*) (1837), 6 A. & E. 469; 2 N. & P. 488.

(*f*) (1818), 2 Ex. 651; 18 L. J. Ex. 114.

otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised."

Alderson v. Maddison. In the recent case of *Alderson v. Maddison*, which was an action by the plaintiff, as heir-at-law of Alderson, to recover the title deeds of a farm, the defendant counterclaimed that she was entitled to a life estate in the farm. It appeared that the defendant was induced to serve Alderson (who died intestate) as his housekeeper for many years, and to give up other prospects of establishment in life, by a verbal promise that Alderson would leave her a life interest in the farm. But, as was there pointed out, to contend that Alderson's heir-at-law was estopped by Alderson's conduct from disputing the validity of an attested document, which purported to be Alderson's will, would be to repeal the Statute of Wills. Lord Selborne said: "I have always understood it to have been decided that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts" (*g*).

Other cases of estoppel by conduct.

But there are other cases of estoppel by conduct besides those on the principle of *Pickard v. Sears* and *Freeman v. Cooke*. A tenant, for instance, is estopped from disputing his landlord's title, and the acceptor of a bill of exchange from denying the signature of the drawer or his capacity to draw; and a young gentleman who takes rent after he comes of age is estopped from denying that the person he takes it from is his tenant. A case of some importance is *Harris v. Truman, Hanbury & Co. (h)*, where the defendants had employed one Fairman to buy barley, and to malt it for them only. Fairman, for the purpose of purchasing such barley, was empowered to draw upon a fund paid into a bank by the defendants. Fairman, having bought barley upon credit, and, at the same time, fraudulently drawn out money from the fund so supplied by the defendants, became bankrupt, and the defendants thereupon seized all the barley and malt upon his premises, the value of which was less than the moneys which he had drawn out. It was urged by the plaintiff, the trustee in his bankruptcy, that the barley dishonestly bought

Harris v. Truman, Hanbury & Co.

(*g*) (1883), 8 App. Ca. 473; 52 L. J. Q. B. 737; overruling *Loffus v. Maw* (1863), 3 Giff. 592; 32 L. J. Ch. 49; and see *Carr v. L. & N. W. Rail. Co.* (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109;

Searf v. Jardine (1882), 7 App. Ca. 350; 51 L. J. Q. B. 612; *Fell v. Parkin* (1882), 47 L. T. 350; 52 L. J. Q. B. 99.

(*h*) (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338.

by Fairman was not bought for the defendants at all; but was bought with the intention of selling it again. But, as Brett, L.J., observed, "If Fairman had been plaintiff in this action it is impossible, after he had represented to the defendants by the accounts that all the barley at the malting was barley bought by him, and approved by the defendants, and to be paid for by them, and after he had drawn upon the defendants' account for the price, that he would not be estopped from saying that he had been defrauding the defendants. If that be so, the trustee in bankruptcy who is suing upon the relation between Fairman and the defendants would also be estopped from relying on the fraud of the bankrupt."

The case of *Young v. Grote* may be usefully remembered as an illustration of estoppel by negligence—that is, of a kind of estoppel by conduct, viz., negligent conduct. On this subject there has recently been a decision (*i*) of some importance. A person named Holmes, becoming impecunious, asked the defendant for his acceptance to an accommodation bill. Willing to oblige, the defendant gave him his blank acceptance on a stamped paper, and authorized him to fill in his name as drawer. Holmes, however, finding that after all he did not require accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant put it into a drawer which he did not lock, and to which his clerk, laundress, &c. had access. From this drawer it was stolen, and finally, after having had a drawer's name put on to it, came into the hands of the plaintiff as indorsee for value. It was held in an action that the defendant was not liable on this bill. *Young v. Grote* was distinguished by Bramwell, L.J., from this case, on the ground that in the former case the defendant had voluntarily parted with the instrument, while in the latter it had been got from him by the commission of a crime.

In a rather earlier case (*k*), it had been held that "negligence in the custody of a draft, or in its transmission by post, will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it," and that "negligence to amount to an estoppel must be in the transaction itself,

Estoppel
by negli-
gence.

Baxendale
v. Bennett.

Arnold *v.*
Cheque
Bank.

(*i*) *Baxendale v. Bennett* (1878), 3 Q. B. D. 525; 47 L. J. C. P. 624.

(*k*) *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; 45 L. J. C. P. 562; and see *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; 32 L. J. Ex. 273; *Garrard v. Lewis* (1882), 10 Q. B. D. 39; 47 L. T. 408. Reference should also be made to the recent cases of

Merchants of the Staple v. Bank of England (1887), 24 Q. B. D. 160; 57 L. J. Q. B. 418; *Colonial Bank v. Cady* (1890), 15 App. Ca. 267; 60 L. J. Ch. 131; and the judgment of Lord Esher in *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243; 58 L. J. Q. B. 357; affirmed by the House of Lords, [1891] A. C. 107; 60 L. J. Q. B. 145.

and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public."

Scholfield
v. Earl of
Londes-
borough.

A very important decision on the law of estoppel by negligence was recently delivered in the case of *Scholfield v. Earl of Londesborough* (*l*). A bill of exchange for 500*l.* was, after acceptance, fraudulently altered by the drawer into a bill for 3,500*l.* The stamp upon the bill was sufficient to cover the larger amount, and the bill when accepted had spaces on the face of it in which the words and figures necessary for the alteration were afterwards written by the drawer. In an action by a holder for value against the acceptor to recover the full amount of the bill, it was held by Lord Esher, M.R., and Rigby, L.J. (Lopes, L.J., dissenting) that the acceptor of a bill owes no duty to the drawer, or to anyone taking the bill, other than to pay the bill on presentment, and that therefore the defendant, even if he were negligent in accepting the bill in the form in which it was presented for acceptance, was not estopped thereby from setting up the true facts, and was not liable on the bill otherwise than according to its original tenour. The Court also held that there was no evidence of negligence. "Suppose, however, there was both a duty and negligence," said Lord Esher, "the two together do not necessarily create an estoppel, because between them and the indorsement to the holder there comes in the felonious act of the drawer. That act, and not any default of the defendant, was the immediate cause of the plaintiff's loss, and so no estoppel arises against the defendant." The learned judge then referred to *Young v. Grote* (*supra*), which he called the "*fount of bad argument*," and said, "The only way in which that case can be supported is on the ground that the customer signed a blank cheque. That is not a case of estoppel at all, for the law merchant says that anyone who signs a blank cheque authorizes the person in whose hands it is to fill it up as his agent. If that is the ground of the decision it may be a right one, and that is the ground on which Parke B., in *Robarts v. Tucker* (*m*), says it may be supported; but it cannot be so on the ground given in the case itself." He then quoted with approval the dictum of Bramwell, B., in *Baxendale v. Bennett* (*n*), that "an estoppel never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do."

Criticism
by Lord
Esher of
Young v.
Grote.

(*l*) [1895] 1 Q. B. 536; 64 L. J. Q. B. 293.

(*m*) (1851), 16 Q. B. 560; 20 L. J. Q. B. 270.

(*n*) *Supra*.

In *McKenzie v. British Linen Co.* it was laid down that a person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way prejudiced or altered, can be held to be an admission or adoption of liability or an estoppel (*o*).

The defendants received a consignment of wheat and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from plaintiffs. Shortly afterwards, the defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might reasonably be supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent, the Court decided that the defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B. (*p*).

Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor (*q*).

Where a company has power to issue legally transferable securities an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such securities be legally transferable, such an irregularity, *a fortiori* any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value, without notice. Nor can such an equity be set up against an equitable transferee, whether the securities were transferable at law or not, if by the original conduct of the company in issuing the securities or by their subsequent dealing with the transferee he has a superior

McKenzie v. British Linen Co.

Coventry v. Great Eastern Railway Co.

Estoppel of bailee.

Romford Canal Co. v. Pocock's claim.

(*o*) (1881), 6 App. Ca. 82; 41 L. T. 431; dictum of Parke, B., in *Freeman v. Cooke* approved of; see also *Seton v. Lafone* (1887), 19 Q. B. D. 68; 56 L. J. Q. B. 415.
(*p*) *Coventry v. Great Eastern Railway Co.* (1883), 11 Q. B. D. 776; 52 L. J. Q. B. 694. And see

Henderson v. Williams, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308.

(*q*) *Ex parte Davies, In re Sadler* (1881), 19 Ch. D. 86; 45 L. T. 632; and see *Rogers v. Lambert*, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187.

equity. If the original conduct of the company in issuing debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor (*r*).

The following are a few of the many cases to be found in the reports on the subject of estoppel; they are, of course, in no way exhaustive, but will probably serve to sufficiently illustrate the principles by which the Courts are guided in determining cases under this branch of the law:—

Williams v. Davies. Justices made an order in bastardy directing the putative father to pay until the mother married, and the father accordingly made payments, some of which were made within a year from the birth. Afterwards the mother married, but her husband died, and thereupon on her application justices made a second order on the putative father to pay. The Court decided that the matter was *res judicata*, and therefore the order was invalid (*s*).

Brunsden v. Humphreys. The plaintiff brought an action in the County Court for damage to his cab through the defendant's negligence, and having recovered the amount claimed, brought an action in the Divisional Court against the defendant claiming damages for personal injury sustained by the plaintiff through the same negligence. The Court decided that inasmuch as the damages for personal injuries might have been claimed in the first action, the judgment recovered in it was a bar to subsequent proceedings. This decision, however, was reversed in the Court of Appeal, which held the plaintiff was entitled to recover as the causes of action were distinct (*t*).

Estoppel of tenant. In a recent Irish case the well-known principle of law, that a *tenant is estopped from denying his landlord's title*, is well illustrated (*u*). But a third person not claiming possession of the land, who has brought goods on to the land by the licence of the tenant, is not estopped from disputing the lessor's title (*x*).

Priestman v. Thomas. In an action in the Probate Division, L. and G. propounded an earlier and P. a later will. The action was compromised, and, by

(*r*) *In re Romford Canal Co.*, Pocock's claim, Trickett's claim, Carew's claim (1883), 24 Ch. D. 85; 52 L. J. Ch. 729. And see *Balkis Consolidated Co. v. Tomkinson*, *ante*, p. 533.

(*s*) *Williams v. Davies* (1883), 11 Q. B. D. 74; 52 L. J. M. C. 87.

(*t*) *Brunsden v. Humphreys* (1884), 14 Q. B. D. 141; 53 L. J.

Q. B. 473; and see *Miles v. McIlwraith* (1883), 8 App. Cas. 120; 52 L. J. P. C. 17; and *Clarke v. Yorke* (1882), 52 L. J. Ch. 32; 47 L. T. 381.

(*u*) *Wogan v. Doyle* (1883), 12 L. R. Ir. 69.

(*x*) *Tadman v. Henman*, [1893] 2 Q. B. 163; 57 J. P. 664.

consent, verdict and judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which L. and G. were parties, obtained a verdict of a jury to that effect, and judgment that the compromise should be set aside. In another action in the Probate Division, for revocation of the probate of the earlier will, the Court held that L. and G. were estopped from denying the forgery (*y*).

L. was charged with night-poaching under 9 Geo. 4, c. 69, and in course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested and discharged him. L. was again summoned for the same offence, upon the same facts, when the justices held that they had no jurisdiction, as the former charge was *res judicata*, and in this decision they were upheld (*z*).

The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time the mortgagor made excuses for not doing so; and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants. The Court decided that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants (*a*).

In answer to an inquiry addressed by an intending mortgagee to the trustee of a fund, whether the life tenant had encumbered his interest, the trustee enumerated certain specific charges on the life interest. At this date the trustee had received notice of several other incumbrances, but he had forgotten their existence. In an action by the mortgagee against the trustee to recover the loss arising from the insufficiency of the mortgage, it was held that the trustee was not liable in the absence of estoppel, and that his answer did not amount to a positive representation that there were no other incumbrances on the life interest so as to create an estoppel against him (*b*).

Where, in an action in a County Court, a defendant has relied

Reg. v.
Bracken-
ridge.

Hall v.
West End
Co.

Low v.
Bouverie.

Webster
v. Arm-
strong.

(*y*) Priestman v. Thomas (1884), 9 P. D. 210; 53 L. J. P. 109.

(*z*) Reg. v. Brackenridge (1884), 48 J. P. 293; and see *The Thyatira* (1883), 8 P. D. 155; 52 L. J. P. 85; *Emmis v. Rochford* (1884), 14 L. R. Ir. 285; *Cropper v. Smith* (1885), 10 App. Cas. 219; 55 L. J.

Ch. 12; *In re Ghost's Trusts* (1883), 49 L. T. 588; *Ryley v. Brown* (1890), 17 Cox, C. C. 79; 62 L. T. 458.

(*a*) *Hall v. West End Advance Co.* (1883), 1 C. & E. 161.

(*b*) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L. J. Ch. 594.

upon a cause of action by way of counter-claim, upon which he has obtained a verdict for an amount beyond the jurisdiction of the County Court, and judgment has been entered for the defendant, but no relief has been given in respect of the balance in excess of the plaintiff's claim, the defendant is not estopped from afterwards bringing an action in the High Court upon the same cause of action (*e*).

Hartcup v. Bell. The estoppel which enables a landlord who is mortgagor without the legal estate to sue for rent is mutual, and renders him liable on the covenants in the lease (*d*).

In re Horton. A marriage settlement contained a recital that B. was "seised of or otherwise well entitled to" certain messuages, the whole deed showing the meaning to be that B. was entitled in one shape or other to the fee simple of all the property therein conveyed. The Court held this a sufficient estoppel as to the part of the property in which at the date of the settlement B. had no interest whatever, but to which her interest accrued subsequently (*e*).

Reg. v. Eardley. Where a divisional Court has decided against an applicant on one application, a divisional Court consisting of other judges will not overrule or review that decision on a second application by him, which, though technically different from the first, raises the identical point again (*f*).

Gandy v. Gandy. Where a litigant has obtained the decision of the Court on the construction of a deed in his favour, he cannot ask the Court in a subsequent action to put an opposite construction on the same deed (*g*).

Carlton v. Bowcock. Where a person, claiming to be assignee of the reversion, receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title, and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third

(*e*) *Webster v. Armstrong* (1885), 54 L. J. Q. B. 236; 1 C. & E. 471; and see 47 & 48 Vict. c. 61, s. 18; *Serrao v. Noel* (1885), 15 Q. B. D. 549; and see *Concha v. Concha* (1886), 11 App. Cas. 541; 56 L. J. Ch. 257.

(*d*) *Hartcup v. Bell* (1883), 1 C. & E. 19.

(*e*) *In re Horton*, *Horton v. Perks* (1884), 51 L. T. 420; and see *Hamill v. Murphy* (1883), 12 L. R. Ir. 400; *Manchester and Oldham Bank v. Cook* (1883), 49 L. T. 674; *Shaw v. Port Philip Gold Mining*

Co. (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 369; *Mowatt v. Castle Steel and Iron Co.* (1886), 34 Ch. D. 58; 55 L. T. 645.

(*f*) *Reg. v. Eardley* (1885), 49 J. P. 551.

(*g*) *Gandy v. Gandy* (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154; and see *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347; 56 L. J. Q. B. 541; *Russell v. Waterford and Limerick Railway* (1885), 16 L. R. Ir. 314; *Houstoun v. Marquis of Sligo* (1885), 29 Ch. D. 448; 52 L. T. 96.

person is the real assignee of the reversion and entitled to maintain ejectment (*h*).

The above are, as has been already stated, only some of the numerous examples of estoppels of various kinds. The law is said to be "favourable to the utility of the doctrine of estoppel, hostile to its technicality." On the one hand, persons must not be allowed to mislead others with impunity; on the other, every little casual remark must not be tortured into an attempt to mislead. In one of the cases just referred to, Lord Bramwell said, "*Estoppels are odious, and the doctrine should never be applied without a necessity for it.*"

(*h*) *Carlton v. Bowcock* (1884), 51 L. T. 659; and see *Ashby v. Day* (1886), 54 L. J. Ch. 935; 54 L. T. 408; *Herman v. Royal Exchange Shipping Co.* (1884), 1 C. & E. 413; *Reg. v. Charnwood Forest Railway* (1884), 1 C. & E. 419; *Barrow Mutual Ship Insurance Co.*

v. Ashburner (1886), 54 L. J. Q. B. 377; 54 L. T. 58; *Yarmouth Exchange Bank v. Blethen* (1885), 10 App. Cas. 293; 54 L. J. P. C. 27; *Thorp v. Dakin* (1885), 52 L. T. 856; *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512; 59 L. J. Q. B. 565.

APPENDICES.



STATUTES IN APPENDIX A.

- 29 Car. II. c. 3 (Statute of Frauds).
- 29 Car. II. c. 7 (Lord's Day Act).
- 14 Geo. III. c. 48 (Insurance on Lives).
- 9 Geo. IV. c. 14 (Lord Tenterden's Act).
- 11 Geo. IV. & 1 Will. IV. c. 68 (Carriers Act).
- 2 & 3 Will. IV. c. 71 (Prescription Act).
- 17 & 18 Vict. c. 31 (Railway and Canal Traffic Act).
- 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act).
- 26 & 27 Vict. c. 41 (Innkeepers Act).
- 34 & 35 Vict. c. 79 (Lodgers' Goods Protection Act).
- 38 & 39 Vict. c. 92 (Agricultural Holdings Act, 1875).
- 41 & 42 Vict. c. 31 (Bills of Sale Act, 1878).
- 43 & 44 Vict. c. 42 (Employers' Liability Act, 1880).
- 44 & 45 Vict. c. 41 (Conveyancing and Law of Property Act, 1881).
- 45 & 46 Vict. c. 43 (Bills of Sale Act, 1882).
- 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882).
- 45 & 46 Vict. c. 75 (Married Women's Property Act, 1882).
- 46 & 47 Vict. c. 61 (Agricultural Holdings (England) Act, 1883).
- 56 & 57 Vict. c. 21 (Voluntary Conveyances Act, 1893).
- 56 & 57 Vict. c. 63 (Married Women's Property Act, 1893).

APPENDIX A.

PRINCIPAL SECTIONS OF PRINCIPAL STATUTES REFERRED TO
IN THE BODY OF THE WORK.

29 CAR. II. C. 3 (1677).

Statute of
Frauds.

An Act for Prevention of Frauds and Perjuries.

1. All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only.

2. Except leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds at least of the full improved value of the thing demised.

4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

17. No contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of

payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contracts, or their agents thereunto lawfully authorised (a).

29 CAR. II. c. 7 (1677).

*An Act for the better Observation of the Lord's Day,
commonly called Sunday.*

For the better observation and keeping holy the Lord's Day, commonly called Sunday, be it enacted . . . that all the laws enacted and in force concerning the observation of the Lord's Day, and repairing to the church thereon, be carefully put in execution; and that all and every person and persons whatsoever shall on every Lord's Day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted); and that every person, being of the age of fourteen years or upwards, offending in the premises shall for every such offence forfeit the sum of five shillings; and that no person or persons whatsoever shall publicly cry, shew forth, or expose to sale any wares, merchandises, fruit, herbs, goods, or chattels whatsoever upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or shewed forth, or exposed to sale.

(a) This section was repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and replaced by sect. 4 of that Act.

14 GEO. III. c. 48 (1774).

An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances except in cases where the Persons Insuring shall have an interest in the Life or Death of the Persons Insured.

1. Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming: . . . be it enacted . . . that, from and after the passing of this Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

2. And be it further enacted that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

3. And be it further enacted that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

9 GEO. IV. c. 14 (1828).

Lord
Tenter-
den's Act.

An Act for rendering a Written Memorandum necessary to the Validity of Certain Promises and Engagements.

6. No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, con-

duct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (a), unless such representation (a) [Sic.] or assurance be made in writing, signed by the party to be charged therewith.

7. Whereas it has been held that the said recited enactments [viz., the 17th section of the Statute of Frauds and a similar Irish statute] do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied, and it is expedient to extend the said enactments to such executory contracts: Be it enacted, that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery (b).

11 GEO. IV. & 1 WILL. IV. c. 68 (1830).

An Act for the more effectual Protection of Mail Contractors, Stage-coach Proprietors, and other Common Carriers for Hire against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof.

The Land
Carriers
Act.

1. Whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased:

(b) This section was repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted . . . that, from and after the passing of this Act, no mail contractor, stage-coach proprietor, or other common carrier, by land for hire, shall be liable for the loss of or injury to any article or articles, or property of the descriptions following—*that is to say*, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured and unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person or any passenger as aforesaid, the value and nature of such article or articles of property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

By 28 & 29
 Vict. c. 94,
 it has been
 provided
 that the
 term
 “lace”
 in this Act
 is not to
 include
 machine-
 made lace.

2. When any parcel or package containing any of the

articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice without further proof of the same having come to their knowledge.

4. No public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid, shall . . . be liable, as at the common law, to answer for the loss of or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

6. Nothing in this Act contained shall extend, or be construed, to annul, or in anywise affect, any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandises.

8. Nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for

any loss or injury occasioned by his or their own personal neglect or misconduct.

2 & 3 WILL. IV. c. 71 (1832).

An Act for shortening the Time of Prescription in certain cases.

Whereas the expression “time immemorial, or time whereof the memory of man runneth not to the contrary,” is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted by the King’s most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall

appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

2. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

3. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

4. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after

the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

6. And be it further enacted, that in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim.

7. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before-mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

8. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

17 & 18 VICT. c. 31 (1854).

*An Act for the better Regulation of the Traffic on Railways
and Canals.*

2. Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; §c.

7. Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability: every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned; that is to say, for any horse, fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be

lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. IV. & 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of the 11 Geo. IV. & 1 Will. IV. c. 68, with respect to articles of the descriptions mentioned in the said Act.

19 & 20 VICT. c. 97 (1856).

Mercan-
tile Law
Amend-
ment Act.

An Act to amend the Laws of England and Ireland affecting Trade and Commerce.

3. No special promise to be made by any person after the passing of this Act to answer for the debt, default, or mis-carriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear

in writing, or by necessary inference from a written document (a).

4. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of the firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise (a).

5. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between

(a) This section was repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

those parties themselves, such last mentioned person shall be justly liable (a).

13. [In reference to the provisions of 9 Geo. IV. c. 14, and 16 & 17 Vict. c. 113], an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

14. [In reference to the provisions of 21 Jac. I. c. 16, &c.], when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators.

26 & 27 VICT. c. 41 (1863).

An Act to amend the Law respecting the Liability of Innkeepers, and to prevent Certain Frauds upon them.

1. No innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except—

- (1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or his servant.

(a) This section was repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(2.) Where the same shall have been deposited expressly for safe custody with such innkeeper. Provided, that, in case of such deposit, the innkeeper may require as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.

2. If any innkeeper shall refuse to receive for safe custody any goods or property of his guest, or if such guest shall through any default of such innkeeper be unable to deposit the same, such innkeeper shall not be entitled to the benefit of this Act in respect of the same.

3. Every innkeeper shall cause at least one copy of sect. 1 printed in plain type to be exhibited in a conspicuous part of the hall or entrance to his inn, and shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

34 & 35 VICT. c. 79 (1871).

Lodgers' Goods Protection Act.

1. If any superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property, or in the lawful possession of, such lodger, and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last

aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods and chattels referred to in the declaration.

2. If any superior landlord, or any bailiff, or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; . . . and the superior landlord shall also be liable to an action at law at the suit of the lodger.

38 & 39 VICT. c. 92 (1875).

An Act for amending the Law relating to Agricultural Holdings in England.

51. Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

53. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf or instead of some fixture belonging to the landlord, then such fixture shall be the property of and be removable by the tenant.

Provided as follows :—

- (1.) Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding :
- (2.) In the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding :
- (3.) Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal :
- (4.) The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :
- (5.) At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal) :

But nothing in this section shall apply to a steam engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof.

54. Nothing in this Act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof.

58. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or that is of less extent than two acres.

41 & 42 VICT. c. 31 (1878).

An Act to consolidate and amend the Law for preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels.

11. The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void. The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as therein stated, and that the bill of sale is still a subsisting security. . . . A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

43 & 44 VICT. c. 42 (1880).

An Act to extend and regulate the Liability of Employers to make Compensation for personal Injuries suffered by Workmen in their service.

1. Where after the commencement of this Act personal injury is caused to a workman—

- (1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or
- (2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or
- (3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to

conform, and did conform, where such injury resulted from his having so conformed ; or

- (4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or
- (5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases ; that is to say,

- (1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.
- (2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned ; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law.
- (3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person

superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

6.—(1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

44 & 45 VICT. c. 41 (1881).

An Act for simplifying and improving the practice of Conveyancing; and for resting in Trustees, Mortgagees, and others, various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered,

received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, in-

cluding the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor; also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

- (i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or
- (ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

45 & 46 VICT. c. 43 (1882).

An Act to amend the Bills of Sale Act, 1878.

4. Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

5. Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

6. Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things; (that is to say,)

(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

7. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3.) If the grantor shall fraudulently either remove or suffer

the said goods, or any of them, to be removed from the premises ;

- (4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes ;
- (5.) If execution shall have been levied against the goods of the grantor under any judgment at law :

Provided that the grantor may, within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

8. Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or, if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof ; and shall truly set forth the consideration for which it was given ; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

9. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

10. The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.

12. Every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

13. All personal chattels seized, or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the

commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of.

14. A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale, which, but for such bill of sale, would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

45 & 46 VICT. c. 61 (1882).

An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes.

22.—(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such : Provided that—

(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name :

(2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to

retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

26.—(1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

53.—(1.) A bill of itself does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This subsection shall not extend to Scotland.

(2.) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

54. The acceptor of a bill, by accepting it—

- (1.) Engages that he will pay it according to the tenor of his acceptance:
- (2.) Is precluded from denying to a holder in due course :
 - (a.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;
 - (b.) In the case of a bill payable to drawer's order, the

then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

- (c.) In case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55.—(1.) The drawer of a bill, by drawing it—

- (a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;

- (b.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2.) The indorser of a bill, by indorsing it—

- (a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;

- (b.) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements ;

- (c.) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. Where a person signs a bill otherwise than as drawer or acceptor he thereby incurs the liabilities of an indorser to a holder in due course.

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

- (1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover

from the acceptor or from the drawer, or from a prior indorser—

- (a.) The amount of the bill ;
 - (b.) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case ;
 - (c.) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.
- (3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

(For other sections of this Act, see pp. 112—115, 120, and 315.)

45 & 46 VICT. c. 75 (1882).

An Act to consolidate and amend the Acts relating to the Property of Married Women.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if

she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown (*a*).

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire (*a*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

(*a*) This sub-section was repealed by 56 & 57 Vict. c. 63 (Married Women's Property Act, 1893), see *post*, p. 580.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use ; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts : Provided that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever,

including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*; but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue

of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against

the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided, that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue, or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

46 & 47 VICT. c. 61 (1883).

An Act for amending the Law relating to Agricultural Holdings in England.

1. Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the First Schedule hereto, he shall, on and after the commencement of this Act, be entitled, on quitting his holding at the determination of a tenancy, to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the First Schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil.

7. A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy,

give notice in writing to the landlord of his intention to make such claim.

Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of the intended claim.

33. Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

34. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

Provided as follows:—

- (1.) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding:
- (2.) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding:
- (3.) Immediately after the removal of any fixture or building the tenant shall make good all damage

occasioned to any other building or other part of the holding by the removal :

- (4.) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :
- (5.) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

44. After the commencement of this Act it shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies to distrain for rent, which became due in respect of such holding, more than one year before the making of such distress, except in the case of arrears of rent in respect of a holding to which this Act applies existing at the time of the passing of this Act, which arrears shall be recoverable by distress up to the first day of January, one thousand eight hundred and eighty-five, to the same extent as if this Act had not passed.

Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due.

45. Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be

distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding : Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been *bonâ fide* paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid.

Agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear.

46. Where any dispute arises—

- (a) In respect of any distress having been levied contrary to the provisions of this Act ; or
- (b) As to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock ; or
- (c) As to any other matter or thing relating to a distress on a holding to which this Act applies :

such dispute may be heard and determined by the County Court or by a Court of summary jurisdiction, and any such County Court or Court of summary jurisdiction may make an order for restoration of any live stock or things unlawfully distrained, or may declare the price agreed to be paid in the

case where the price of the feeding is required to be ascertained, or may make any other order which justice requires; any such dispute as mentioned in this section shall be deemed to be a matter in which a Court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such Court of summary jurisdiction under this section may, on giving such security to the other party as the Court may think just, appeal to a Court of general or quarter sessions.

54. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

55. Any contract, agreement, or covenant made by a tenant, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the First Schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void both at law and in equity.

56. Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this Act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained tenant of the holding, and quitted the holding at the time at which the incoming tenant quits the same.

56 & 57 VICT. c. 21 (1893).

The Voluntary Conveyances Act, 1893.

2. Subject as hereinafter mentioned, no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act twenty-seven Elizabeth, chapter four, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.

3. This Act does not apply in any case in which the author of a voluntary conveyance of any lands, tenements, or hereditaments has subsequently, but before the passing of this Act, disposed of or dealt with the same lands, tenements, or hereditaments to or in favour of a purchaser for value.

4. The expression "conveyance" includes every mode of disposition mentioned or referred to in the said Act of Elizabeth.

56 & 57 VICT. c. 63 (1893).

The Married Women's Property Act, 1893.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a.) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b.) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c.) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to;

Provided that nothing in this section contained shall render

available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction, by judgment or order, from time to time, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

3. Sect. 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

4. Sub-sects. (3) and (4) of sect. 1 of the Married Women's Property Act, 1882, are hereby repealed.

APPENDIX B.

PRINCIPAL LEGAL MAXIMS.

- (1.) Accessorium non ducit, sed sequitur, suum principale.
(*The accessory does not lead, but follows, its principal.*)
- (2.) Acta exteriora indicant interiora secreta.
(*Overt acts proclaim a man's intentions and motives.*)
- (3.) Actio personalis moritur cum personâ.
(*A personal right of action ceases at death.*)
- (4.) Actus Dei nemini facit injuriam.
(*The act of God does injury to no man.*)
- (5.) Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat.
(*Instruments ought to be construed leniently, with allowance made for the ignorance of people who are not lawyers, so that the transaction may be supported, and not rendered nugatory.*)
- (6.) Caveat emptor.
(*The buyer must look after himself.*)
- (7.) Cessante ratione, cessat lex.
(*When the reason for a law ceases to exist, so also does the law itself.*)
- (8.) Contemporanea expositio est optima et fortissima in lege.
(*The best way of getting at the meaning of an instrument is to ascertain when and under what circumstances it was made.*)
- (9.) Cuilibet in suâ arte perito credendum est.
(*Every man is an expert in the particular branch of business he is familiar with.*)

- (10.) Delegatus non potest delegare.
(*A person having merely delegated authority cannot himself delegate that authority to another.*)
- (11.) De minimis non curat lex.
(*The law does not trouble itself about trifles.*)
- (12.) Domus sua est cuique tutissimum refugium.
(*A man's house is his safest retreat.*)
- (13.) Ex nudo pacto non oritur actio.
(*In order to ground an action, an agreement must have a consideration.*)
- (14.) Expedit reipublicæ ne quis suâ re male utatur.
(*The good of the State requires a man not to injure his own property.*)
- (15.) Expressum facit cessare tacitum.
(*When all the terms are expressed, nothing can be implied.*)
- (16.) Ex turpi causâ non oritur actio.
(*Immorality will not ground an action.*)
- (17.) Id certum est quod certum reddi potest.
(*What can be reduced to a certainty is already a certainty.*)
- (18.) Ignorantia facti excusat, ignorantia juris non excusat.
(*A man may be pardoned for mistaking facts, but not for mistaking the law.*)
- (19.) In contractis tacite insunt quæ sunt moris et consuetudinis.
(*Persons are presumed to contract with reference to habits and customs.*)
- (20.) In jure non remota sed proxima causa spectatur.
(*It is not the remote but the immediate cause that the law looks at.*)
- (21.) Interest reipublicæ ut sit finis litium.
(*It is the interest of the State that litigation should cease.*)
- (22.) Judicis est jus dicere, non dare.
(*A judge should administer the law as he finds it, not make it.*)
- (23.) Lex non cogit ad impossibilia.
(*The law never urges to impossibilities.*)
- (24.) Lex semper intendit quod convenit rationi.
(*The law must be taken to intend what is reasonable.*)

- (25.) Lex spectat naturæ ordinem.
(The law takes into account the natural succession of things.)
- (26.) Modus et conventio vincunt legem.
(Persons may contract themselves out of their legal liabilities.)
- (27.) Non dat qui non habet.
(A man cannot give what he has not got.)
- (28.) Non omnium quæ a majoribus constituta sunt ratio reddi potest.
(A reason cannot be given for everything that our ancestors were pleased to ordain.)
- (29.) Nullum simile est idem nisi quatuor pedibus currit.
(Similarity is not analogy unless it runs on all fours.)
- (30.) Omne majus continet in se minus.
(The greater includes the less.)
- (31.) Omnia præsumuntur contra spoliatores.
(Every presumption is made against one who spoils.)
- (32.) Omnia præsumuntur rite et sollenniter esse acta.
(It is presumed that all the usual formalities have been complied with.)
- (33.) Omnis rati habitio retrahitur et mandato priori æquiparatur.
(A ratification is taken back and made equivalent to a previous command.)
- (34.) Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.
(The best system of law is that which leaves the least to the discretion of the judge; the best judge is he who leaves the least to his own discretion.)
- (35.) Optimus legis interpret est consuetudo.
(Custom is the best interpreter of law.)
- (36.) Potior est conditio possidentis.
(There is a great advantage in being in possession.)
- (37.) Qui facit per alium, facit per se.
(He who does a thing by another does it himself.)
- (38.) Qui hæret in literâ hæret in cortice.
(He who harps on the mere letter of a written instrument does not get at the pith of the matter.)

- (39.) Qui non improbat, approbat.
(*Not blaming is equivalent to praising.*)
- (40.) Qui prior est tempore, potior est jure.
(*The law favours the earlier in point of time.*)
- (41.) Qui sentit commodum, sentire debet et onus.
(*Benefit and burden ought to go hand in hand.*)
- (42.) Quicquid plantatur solo, solo cedit.
(*Whatever is planted in the ground becomes part of the ground.*)
- (43.) Quilibet potest renunciare juri pro se introducto.
(*A man may waive a right established for his own benefit.*)
- (44.) Quod ab initio non valet, in tractu temporis non convalescit.
(*Time will not cure what is wrong from the beginning.*)
- (45.) Quod fieri non debet factum valet.
(*What ought never to have been done at all, if it HAS been done, may be valid.*)
- (46.) Quod subintelligitur, non deest.
(*What is to be understood, is as good as if it were there.*)
- (47.) Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.
(*When the language of a written instrument is perfectly plain, no construction will be made to contradict the language.*)
- (48.) Res inter alios acta alteri nocere non debet.
(*A man ought not to be prejudiced by what has taken place between others.*)
- (49.) Res judicata pro veritate accipitur.
(*The decision of a court of justice is assumed to be correct.*)
- (50.) Respondeat superior.
(*A man must answer for his dependents.*)
- (51.) Salus populi suprema lex.
(*The welfare of the State is the highest law.*)
- (52.) Sic utere tuo ut alienum non lædas.
(*Make such a use of your own property as not to injure your neighbour's.*)
- (53.) Simplex commendatio non obligat.
(*A man is not obliged to cry stinking fish.*)

- (54.) Solvitur secundum modum solventis.
(*Payment is to be made as the payer pleases.*)
- (55.) Spondes peritiam artis.
(*If your position implies skill, you must use it.*)
- (56.) Ubi jus, ibi remedium.
(*Where there is a right, there is a remedy.*)
- (57.) Verba chartarum fortius accipiuntur contra proferentem.
(*The language of an instrument is to be taken strongly against the person whose language it is.*)
- (58.) Verba generalia restringuntur ad habilitatem rei vel personæ.
(*General words are to be tied down and interpreted according to their context.*)
- (59.) Vigilantibus non dormientibus jura subveniunt.
(*To get the law's help a man must not go to sleep over his own interests.*)
- (60.) Volenti non fit injuria.
(*The man who is the author of his own hurt has no right to complain.*)

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